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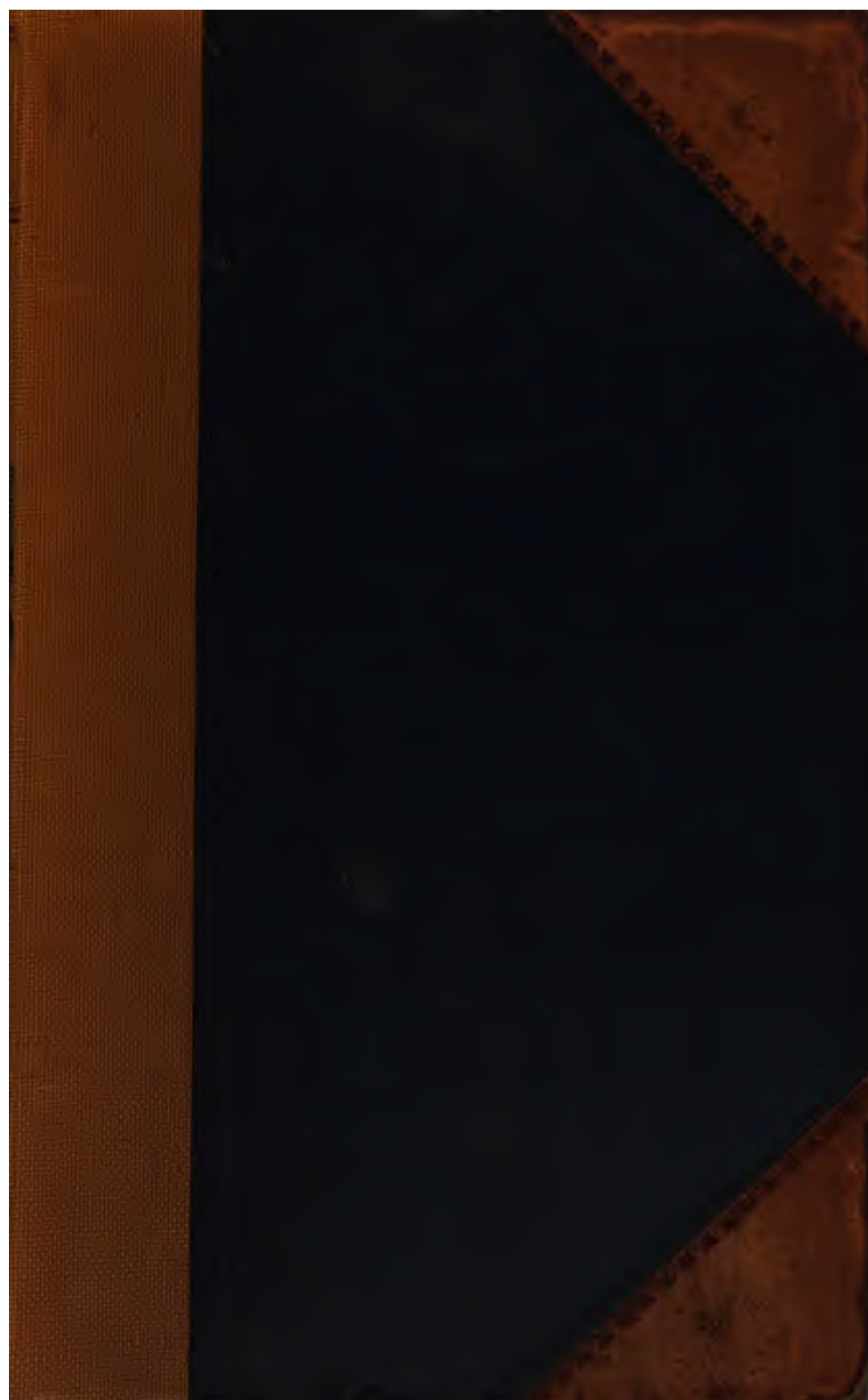
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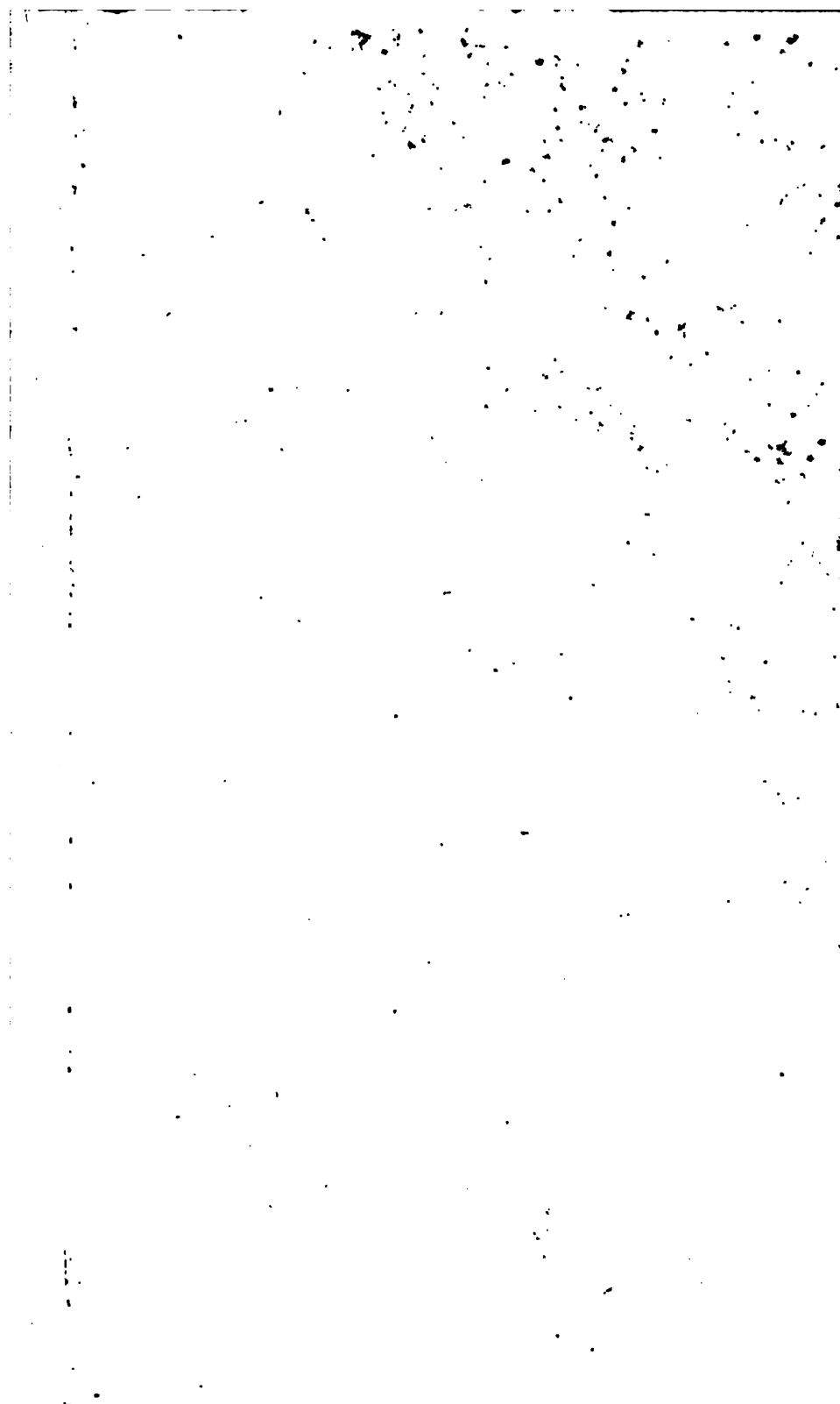
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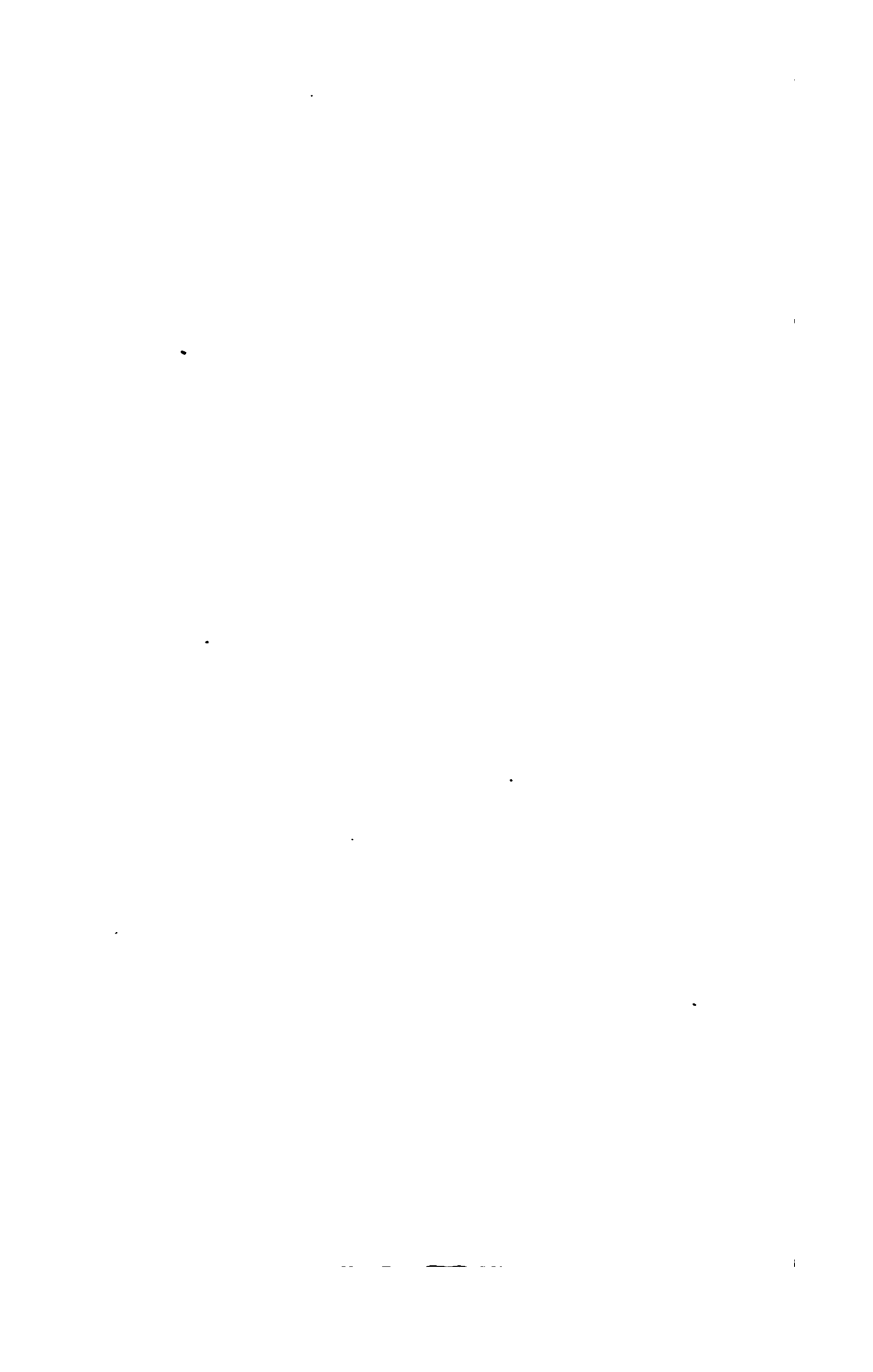
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LA  
**REVUE CRITIQUE**

DE  
**Législation et de Jurisprudence**

DU  
**CANADA.**

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PUBLIÉE PAR

MM. Wm. H. KERR,	L. A. JETTÉ,
D. GIROUARD,	JOHN A. PERKINS,
H. F. RAINVILLE.	

**avec le concours de plusieurs avocats.**

*De fide et officio judicis non recipitur  
quæstio, sed de scientiâ sive sit error  
juris sive facti.—LORD BACON.*

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# SOMMAIRE DES MATIERES.

## 1ÈRE LIVRAISON.

	PAGE
10. J. C. BLUNTSCHLI: Opinion impartiale sur la Question de l'Alabama . . . . .	1
20. WM. H. KERR: The Fishery Question . . . . .	38
30. D. GIROUARD: L'Arbitrage Provincial . . . . .	68
40. JOHN A. PERKINS: My First Jury Trial . . . . .	89
50. EDW. CARTER, C. R.: Bibliographie—Revue de l'ouvrage de Mr. Kerr, "The Magistrate's Act of 1869, &c." .	99
60. IVAN WOTHERSPOON: Chronique du Palais . . . . .	107
70. H. F. RAINVILLE: Sommaire des Décisions . . . . .	119

## 2ME LIVRAISON.

10. D. GIROUARD: Conflict of Commercial Prescriptions * .	125
20. Hon. E. T. MERRICK: The Laws of Louisiana . . . . .	152
30. WM. H. KERR: Deeds of Composition . . . . .	171
40. D. GIROUARD: Le Droit Constitutionnel du Canada . . . . .	189
50. WM. H. KERR: The Navigation of the River St. Lawrence .	204
60. D. GIROUARD: The Joint High Commission . . . . .	219
70. E. RACICOT: A Nos Législateurs . . . . .	228
80. LE SECRÉTAIRE DE LA RÉDACTION: Jurisprudence Comparée de la Cour d'Appel . . . . .	231
90. WM. H. KERR: "The American Law Review" on the Fishery Question . . . . .	238
100. LE SECRÉTAIRE DE LA RÉDACTION: Sommaire des Décisions Récentes . . . . .	241

### 3ME LIVRAISON.

	PAGE
10. HON. J. H. GRAY: Assimilation of the Statutory Laws of Ontario, Nova Scotia, and New Brunswick .	249
20. D. GIROUARD: Le Droit Constitutionnel du Canada .	263
30. C. ROSELIUS: Introductory Lecture to the Study of the Law . . . . .	273
40. HON. J. H. GRAY: The Riel-Scott Affair . . .	293
50. D. GIROUARD: The Treaty of Washington . . .	302
60. H. H. MOSES: Writ of Prohibition . . . . .	360
70. P. E. NORMANDEAU: Re registration of Real Rights .	368
80. LA RÉDACTION: La Jurisprudence Comparée de la Cour d'Appel . . . . .	377

### 4ME LIVRAISON.

10. HON. ISAAC F. REDFIELD: The History and Success of Law Reform through the agency of Legislation in the United States . . . . .	381
20. F. LANGELIER: De l'Inexécution des Obligations .	391
30. WM. H. KERR: Deeds of Composition . . . . .	405
40. HON. J. H. GRAY: Wills and Intestacy . . . . .	417
50. D. GIROUARD: Constitutional Law—Church and State .	431
60. HON. J. H. GRAY: The Election Laws . . . . .	457
70. WM. H. KERR: Legal Ethics . . . . .	466
80. WM. H. KERR: The Queen v. Coote . . . . .	470
90. LA RÉDACTION: Digest of Recent Decisions . . . . .	473



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**PROSPECTUS.**

*De fide et officio judicis non recipitur  
quæstio, sed de scientiâ sive sit error  
juris sive facti.*—LORD BACON.

Le titre que nous donnons à cette *Revue* exprime toute la pensée de ses fondateurs.

Les lois de notre pays sont rarement soumises à d'autres appréciations que celles de nos tribunaux, lorsque ceux-ci sont appelés à les appliquer aux cas particuliers qui se présentent devant eux; et pourtant combien n'y en a-t-il pas, surtout parmi ces lois indigestes dont nos parlements nous dotent chaque année, qui mériteraient une critique sévère?

D'un autre côté les décisions de nos tribunaux,

silencieusement compilées dans des recueils d'un grand mérite d'ailleurs, passent à la postérité sans un mot de commentaire ou d'explication. Dans bien des cas néanmoins, une étude approfondie des motifs de ces arrêts ne pourrait qu'en augmenter le poids et l'autorité, tandis que dans d'autres, une critique calme et impartiale, pourrait quelquefois détruire l'influence de certaines erreurs ornées du prestige de la chose jugée.

Combattre sans hésitation les erreurs et les faux principes, qui se rencontrent dans la législation ou la jurisprudence, et tenter de donner toujours le dernier mot au droit à la logique et à la raison, tel est le programme que s'imposent les fondateurs de cette *Revue*.

Nous comprenons les difficultés et la responsabilité de cette tâche; appelés par état à participer à l'administration de la justice, nous savons qu'elle ne doit pas être dépouillée de ce prestige qui fait sa force et son autorité morale. Et même s'il nous était permis de dire, suivant la fière expression d'un avocat français, qu'au droit d'être assis au Barreau, nous préférons l'honneur d'y être debout, nous n'aurions encore jamais le sot orgueil de ne pas garder toujours envers la magistrature du pays ce respect qu'elle mérite à un si haut degré.

Mais passionnés pour le progrès et l'avancement de la profession à laquelle nous nous honorons d'appartenir, il nous a paru impossible de laisser inexploré, le vaste champ d'études et de recherches qu'offre, à tout esprit sérieux et observateur, l'immense travail

de législation et de codification qui s'est fait, depuis quelques années, dans notre Province; les nombreuses questions que fait naître tous les jours l'augmentation constante des rapports de nos nationaux avec les habitants des pays étrangers; les circonstances politiques nouvelles où se trouve notre pays lui-même; enfin ces mille et une nécessités de la vie sociale et politique d'un peuple qui progresse et qui tend à perfectionner de plus en plus ses institutions.

A mesure que notre horizon politique s'est agrandi, les questions soumises à nos parlements et à nos tribunaux se sont élevées, et les intérêts publics et privés ont pris des proportions plus considérables. Depuis quelques années, nombre de questions de droit international public et privé ont été débattues devant nos Cours, et notre nouveau régime politique vient d'y amener tout à coup les questions constitutionnelles.

Il y a donc là une situation nouvelle, imposant au Barreau de ce pays des devoirs nouveaux, pour lui faire atteindre dans notre société cette position élevée qu'il occupe dans tous les pays du monde civilisé. Déjà, grâce à l'émulation produite par l'encombrement de la profession, la connaissance du droit est devenue plus générale, et si le Barreau et la magistrature de notre pays s'énorgueillissent avec raison des hommes illustres qui en ont fait autrefois la gloire, les circonstances, qui font les hommes, rendront peut-être le présent digne d'un aussi glorieux passé. Ce sera donc pour nous un devoir de travailler sans relâche, à assurer à notre profession,

ces conquêtes incessantes de l'étude et de la science qui ont toujours fait le prestige du Barreau dans le monde entier. Le concours de plusieurs de nos confrères, qui ont bien voulu nous promettre leur collaboration, nous fait espérer que cette tâche ne sera pas au-dessus de nos forces.

WM. H. KERR.

L. A. JETTÉ.

D. GIROUARD.

JOHN A. PERKINS, JR.

H. F. RAINVILLE.

# REVUE CRITIQUE

DE

## *Législation et de Jurisprudence.*

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### OPINION IMPARTIALE SUR LA QUESTION DE L'ALABAMA ET SUR LA MANIÈRE DE LA RÉSOUTRE.\*

PAR LE DR. J. C. BLUNTSCHLI,  
*Professeur à l'Université de Heidelberg.*

#### 1.—OBSERVATIONS PRÉLIMINAIRES.

A plusieurs reprises et de divers côtés j'ai été invité à formuler une opinion impartiale sur le différend Anglo-Américain connu sous le nom de : question de l'Alabama. J'ai longtemps hésité à donner suite à cette demande, partie à cause de la difficulté de la tâche et de l'insuffisance de mes renseignements, partie dans la crainte de ne pouvoir répondre complètement à l'attente de mes amis. Si je me hasarde enfin à dire publiquement ma manière de voir, je n'ai en aucune façon la prétention de prononcer un jugement décisif. Tout ce que je souhaite, c'est de contribuer à éclairer l'opinion publique, et je serais heureux si l'avis que je me propose d'émettre pouvait hâter, dans une certaine mesure, la solution pacifique du différend.

Sans doute la crainte de voir la question de l'Alabama devenir une cause de guerre entre les deux puissances a depuis longtemps disparu. Nous sommes loin de ces temps, où toute contestation non résolue entre États avait la guerre pour conséquence inévitable. Les peuples modernes commencent par examiner si la

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\* L'importance actuelle de cet article nous a engagé à le reproduire de la *Revue de Droit International et de Législation comparée*, vol. 2, pp. 452-485.

guerre est un moyen proportionné au droit qu'ils entendent maintenir, et ils s'abstiennent de ce périlleux remède, du moment où ils acquièrent la conviction qu'il leur sera beaucoup plus facile de supporter, pour un temps encore, la suspension du droit en litige, que de se soumettre immédiatement aux sacrifices et aux maux inséparables de la guerre. Néanmoins la persistance de ce différend ne constitue pas seulement un danger permanent pour les deux nations, à cause de la possibilité que, d'autres dissensions venant à surgir, elles ne finissent malgré tout par en appeler aux armes. Elle est encore une menace permanente pour le monde civilisé tout entier, et particulièrement pour le commerce de tous les peuples. Car leur sécurité en temps de guerre est intéressée à ce que la question de l'Alabama reçoive une juste solution.

Les États-Unis ont l'habitude de demeurer neutres dans les guerres Européennes. Mais supposons que, la question de l'Alabama étant encore en suspens, une guerre éclate entre l'Angleterre et la Russie. La navigation et le commerce maritime de l'Angleterre ne seraient-ils pas très sérieusement menacés dans leurs intérêts, si les États-Unis, tout en restant neutres, permettaient aux Russes d'équiper en Amérique des corsaires dans le genre de l'Alabama, et d'en infester les mers ? Si en général les États neutres ne sont pas obligés d'empêcher sérieusement l'armement de corsaires dans leurs ports, est-ce que dès-lors toutes les nations qui participent au commerce maritime ne courent pas le même danger, aussitôt que leurs ennemis réussissent à exciter, par l'appât du gain, des constructeurs neutres à équiper des corsaires ?

La tendance générale du droit des gens moderne est de protéger et de garantir autant que possible, même en temps de guerre, la propriété et l'activité privées. Il n'est donc nullement indifférent de savoir, comment on envisage les dommages considérables que le commerce maritime Américain a éprouvés pendant la guerre civile d'Amérique. La solution de la question de l'Alabama aura pour effet, soit de consacrer énergiquement, soit d'infirmier notablement cette garantie du droit privé.

## 2.—RECONNAISSANCE DE LA CONFÉDÉRATION DU SUD COMME PUISSANCE BELLIGÉRANTE.

Lorsque le sénateur Sumner du Massachusetts prononça, le 13 Février, 1869, au Sénat de Washington, le discours qui décida

du sort de la convention arrêtée entre l'ambassadeur Américain à Londres, Reverdy Johnson, et le Ministre des affaires étrangères de l'Angleterre, Lord Clarendon, pour mettre fin au différend de l'Alabama,—le principal reproche qu'il adressa à cette convention fut d'avoir traité une grande question d'intérêt national, comme une mesquine question d'argent; d'avoir fait abstraction des griefs les plus sérieux du peuple Américain, pour ne s'occuper que des réclamations individuelles de quelques armateurs et de quelques négociants. Il fit ressortir avec force les griefs nationaux de l'Union contre la Grande-Bretagne.

La première plainte qu'il élève contre le gouvernement Britannique est d'avoir traîtreusement, un mois à peine après le bombardement du fort Sumter, reconnu les États du Sud comme puissance belligérante, et d'avoir ainsi préparé le terrain à de nouvelles injustices. Sans cette reconnaissance, aucun corsaire n'eût pu être construit en Angleterre pour les " rebelles ; " c'eût été un acte de " piraterie."

Voyons si cette accusation est justifiée.

Il est notoire que ni l'Angleterre ni la France n'ont *jamaïs* reconnu la Confédération du Sud comme un *État nouveau*; les cabinets des deux pays ont pu souhaiter de voir l'union des États-Unis se déchirer en deux groupes politiques, et de voir se briser la menaçante prépondérance de la grande fédération: mais ils se sont bien gardés d'une reconnaissance prématurée de la Confédération comme corps politique définitivement séparé de l'Union du Nord. Les événements postérieurs ont prouvé combien cette circonspection était fondée.

Par contre les puissances Européennes ont à coup sûr reconnu de bonne heure les États du Sud comme partie *belligérante*. Était-ce un tort?

Il est certain qu'il faut distinguer entre le côté *politique* et le côté *juridique* de la reconnaissance. Aux yeux du patriote Américain le maintien de l'union constituait pour sa nation un intérêt vital de premier ordre; le soulèvement des États du Sud et leurs efforts pour se déclarer indépendants devaient donc lui paraître une rébellion coupable, qu'il fallait se hâter à tout prix de réprimer par la force. On comprend dès-lors que la reconnaissance l'ait péniblement affecté, et qu'il l'ait considérée comme un procédé hostile de la part d'un gouvernement étranger, mais jusque-là ami. Comme en fait elle eut nécessairement pour suite de préparer des difficultés à la politique de l'union, et de favoriser

celle de la sécession, il était naturel qu'il l'envisageât comme un appui intentionnel prêté à celle-ci. Il se pouvait aussi qu'une certaine sympathie des hommes d'État Anglais pour les États du Sud, et le secret espoir de voir les deux puissances belligérantes se perpétuer comme deux États distincts, eussent contribué à précipiter la reconnaissance. La confiance dans la durée de l'union pouvait être ébranlée dans certaines régions, et l'on pouvait n'être pas convaincu de sa nécessité. Tout cela n'a rien à faire avec la question de savoir si la reconnaissance des États du Sud comme puissance belligérante est, ou non, une violation du droit des gens. Alors même qu'il serait pleinement démontré que cet acte fut une *faute politique* de la part des hommes d'État Anglais, il ne s'en suivrait aucunement qu'elle serait aussi une *injustice*.

Chaque État a, vis-à-vis des autres États, le droit de diriger librement sa conduite politique, d'après ses propres notions et conformément à ses propres intérêts; il doit seulement s'interdire de léser ce qui constitue le droit commun de toutes les nations. La politique varie d'après le point de vue auquel elle se place et d'après le but qu'elle se propose; le droit est un, et lie également toutes les parties. De là vient que la conduite politique d'un gouvernement le rend à la vérité responsable envers le peuple qu'il régit, mais non envers les États étrangers, tandis que, en droit international, il doit compte à ces derniers des injustices qu'il commettrait à leur égard.

En tous cas, il rentre dans le domaine du droit de déterminer *sous quelles conditions* un parti qui recourt aux armes peut être reconnu comme *partie belligérante*. La guerre constitue toujours et avant tout un *fait*; mais toute lutte à main armée, quand même elle serait militairement organisée, n'est pas une guerre. Lorsque, dans l'Italie méridionale, les brigands se montrent en troupes armées, régulièrement commandées, et livrent bataille aux troupes du gouvernement, ils ne forment point pour cela une partie belligérante, mais seulement des bandes de malfaiteurs. La distinction repose sur ce que la guerre est une *lutte politique*, engagée pour des fins politiques. Or les brigands n'aspirent ni à défendre le droit politique existant, ni à en créer un nouveau: ils n'obéissent qu'au désir coupable de se rendre maîtres des personnes, et de s'emparer violemment du bien d'autrui. Ils sont donc justiciables des tribunaux criminels. Le droit des gens n'a pas à s'en inquiéter.



Il en est déjà autrement lorsque, dans un État, un grand parti de citoyens ou de sujets, convaincu de la nécessité d'une révolution ou de la justice de ses réclamations, prend les armes, s'organise militairement et oppose des troupes régulières aux troupes du gouvernement. Celui-ci, il est vrai, cherchera ici encore, aussi longtemps que possible, à réprimer le soulèvement par l'application de ses lois pénales; il s'efforcera de soumettre les insurgés comme " rebelles " ou " coupables de haute trahison, " et de les faire punir par ses tribunaux.

Mais la grande marche de l'histoire du monde et les décrets de la justice divine qui s'y révèlent ont prouvé depuis longtemps, avec une irrésistible évidence, ce que cette manière d'envisager, le Code pénal à la main, les grandes révolutions des États, a d'impraticable et d'insensé. La lutte armée des grands partis politiques peut prendre des dimensions telles que le cadre étroit de la justice répressive s'en trouve débordé ou rompu dans tous les sens. Il ne reste plus dès-lors qu'à se placer au point de vue, non de la procédure criminelle, mais du droit public et du droit des gens.

Du reste, le parti révolté qui opère avec des corps d'armée militairement organisés, et qui entreprend de faire triompher par la guerre son programme politique agit, alors même qu'il ne forme point un État, tout au moins comme s'il en constituait un, au lieu et place d'un État (*an States Statt*). Il affirme la justice de sa cause et la légitimité de sa mission avec un bonne foi égale à celle qui se présume de droit chez tout État belligérant. Il ne se compose point d'un ramassis de conspirateurs criminels, mais il apparaît comme une *force nationale ennemie*, analogue de tous points à un État étranger ennemi. C'est pourquoi ses troupes sont sous la protection du droit des gens. L'histoire de tous les peuples démontre que ces partis révoltés ont souvent réussi, soit à fonder un nouvel État, soit à conquérir d'une manière durable la puissance souveraine dans l'État dont ils faisaient partie. On ne saurait donc contester à des partis aussi puissants et bien armés une *aptitude possible* à constituer des États nouveaux. Or, c'est là-dessus précisément que repose la possibilité juridique de les considérer comme de véritables belligérants.

C'est à coup sûr un des grands progrès de la civilisation d'avoir, dans ces derniers temps, fait reculer de plus en plus, en pareil cas, l'application rigoureuse des lois pénales devant l'application plus humaine du droit des gens. Il en est résulté que les guerres

civiles, autrefois si remplies d'horreurs, se sont adoucies dans une proportion égale. Tant que les officiers et les soldats de l'armée rebelle ont à craindre, s'ils sont faits prisonniers, d'être incarcérés comme criminels d'état, ou d'être punis de mort, ils seront infailliblement amenés à se venger, par forme de représailles, sur les prisonniers qu'ils font à leur tour parmi les troupes du gouvernement, et à les mettre également à mort. La guerre civile qui éclata en Espagne à la suite de l'insurrection Carliste, vers 1840, offre un exemple terrible et encore récent de deux partis armés, renchérissant l'un sur l'autre en sauvages cruautés. Si, au contraire, les troupes insurgées sont assurées que les ennemis auxquels elles font une guerre régulière ne les poursuivront et ne les puniront pas en criminels, mais les traiteront en ennemis, d'après les règles du droit des gens adoptées chez les nations civilisées; si elles savent que, en cas de revers, elles auront à subir le sort des prisonniers de guerre, mais non des malfaiteurs; alors elles aussi se conformeront au droit des gens, si elles sont victorieuses, et s'abstiendront de toute barbarie inutile.

A cela se joint une seconde considération. Lorsque tant d'hommes, et parmi eux tant de citoyens estimés et honorables, prennent part au soulèvement, lorsque, d'un même mouvement, une population entière court aux armes, dans ce cas la punition de tous devient une impossibilité, et la punition de quelques-uns ne paraît qu'une inconséquence cruelle. Pour peu que le pouvoir vainqueur écoute les conseils de l'équité, il lui répugne d'agir comme juge criminel, et il se persuade que, devant une lutte engagée dans de pareilles proportions, c'est dans des *mesures politiques* et non dans la répression pénale qu'il faut chercher le remède au mal existant.

C'est principalement par ces motifs pratiques que la notion de la *belligérance*, et par suite l'application du droit des gens en opposition avec le droit pénal, au lieu de se restreindre à deux états étrangers, en guerre l'un avec l'autre, a été étendue à une *partie intégrante de la population d'un Etat*, qui

- a. est de fait organisée comme force militaire;
- b. observe dans la conduite des hostilités les lois de la guerre, et
- c. croit de bonne foi lutter, au lieu et place de l'Etat, ("an States Statt") pour la défense de son droit public.

Lorsque les Colonies Américaines prirent les armes pour conquérir leur indépendance, le roi et le parlement de la Grande-Bretagne commencèrent par les déclarer séditiennes et rebelles, et il fallut assez longtemps pour que les généraux Anglais reconnus-

sent les milices Américaines comme troupes d'une force belligérante, c'est-à-dire comme ennemis honorables. On se rappelle comment, dans le principe, Lord Howe refusait à Washington le titre de général, bien qu'il désirât négocier avec lui, et avec quelle fierté le grand général repoussa la prétention de son adversaire de le traiter en simple particulier, alors qu'il commandait les armées de son pays. On se rappelle encore comment le général Américain Lee, fait prisonnier en 1776 par les troupes Anglaises, fut d'abord traité en prisonnier criminel, jusqu'au moment où les efforts de Washington et ses menaces de représailles parvinrent à décider le général ennemi à traiter Lee en prisonnier de guerre\*. Toutefois, dans le cours de la guerre de l'Indépendance, les Anglais se décidèrent à se relâcher de leur rigorisme légitimiste, et à traiter leurs ennemis comme puissance belligérante.

Que l'on ne dise pas que la grande différence consiste en ce que les Colonies Américaines combattaient alors pour leur liberté contre la tyrannie Anglaise, tandis que les États du Sud combattaient pour l'esclavage contre le maintien de l'Union. Il n'était pas possible d'exiger dès-lors des Anglais qu'ils reconnussent sans difficulté le droit des colonies de briser arbitrairement le lien politique qui les unissait à la mère-patrie, et de secouer l'autorité du roi et du parlement. Mais il n'était pas davantage possible de douter que les États du Sud ne se crussent, de bonne foi, en droit de combattre pour leur indépendance, pour leur propriété, pour leurs intérêts les plus considérables. Les opinions des partis belligérants au sujet de leurs droits sont d'ordinaire très divergentes, et le plus souvent absolument contradictoires. Ce que l'un parti proclame comme son droit sacré, n'est aux yeux de l'autre qu'une iniquité scandaleuse. C'est précisément pour cette raison que l'applicabilité du droit militaire international ne dépend en aucune façon du plus ou moins de fondement des prétentions de chaque parti.—Pendant la guerre on admet, dans l'intérêt de l'humanité, que *les deux partis agissent de bonne foi pour la défense de leurs prétendus droits*. La question de droit en litige n'est décidée que par l'issue de la guerre, dans le traité de paix. Mais, jusqu'à ce moment, chacun des deux partis peut exiger d'être traité comme *parti gouvernemental*, conformément aux règles réciproquement obligatoires du droit des gens.

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\* Cf. PHILLIMORE, *Intern. Law*, III, p. 150. Cet auteur cite encore d'autres conflits semblables survenus pendant la guerre de l'indépendance Américaine.

Les conditions qui, d'après l'exposé que nous venons d'en faire, doivent concourir pour qu'un parti insurgé puisse légitimement aspirer à être reconnu comme belligérant, se trouvaient toutes réunies chez les Etats du Sud insurgés. En effet :

a. Ils étaient depuis longtemps *organisés comme États*, ayant une législation, un gouvernement et une administration judiciaire propres. Et maintenant ils s'étaient réunis en *confédération*, à l'instar de l'Union elle-même, avec un président à leur tête et avec tout l'appareil organique d'un Etat complet. Il n'y avait donc pas là une bande d'insurgés arbitrairement agglomérés, mais un pouvoir gouvernemental régulier, luttant pour son existence contre l'ancien gouvernement de l'Union. Que la confédération se fût constituée à tort ou à raison, dans les deux cas elle se présentait sous les dehors d'un Etat régulièrement constitué, et cela suffit au point de vue du droit des gens.

b. La confédération possédait une *armée* complètement organisée, et commandée par des généraux qui disputaient la victoire aux généraux et à l'armée de l'Union. La guerre fut conduite d'après les principes et les usages militaires. L'armée de l'Union n'était pas une simple troupe d'exécution, chargée de réprimer un soulèvement désordonné, mais bien une armée en campagne, obligée de livrer des batailles en règle à une autre armée en campagne, et de déployer toutes ses forces pour la vaincre. *Ce fut la plus grande, la plus gigantesque guerre civile dont les annales du monde fassent mention.*

L'Union pouvait bien se croire autorisée à qualifier les États du Sud de "rebelles," et se réserver de punir encore leurs chefs après la victoire. D'après le sentiment juridique du Nord, ces chefs avaient grièvement attenté contre la patrie commune, contre la constitution de l'Union, contre la prospérité générale. Cependant l'issue de la guerre civile nous a montré, à la satisfaction de tous les esprits impartiaux, le gouvernement de l'Union renonçant à traduire les vaincus devant la justice criminelle, et se contentant en définitive d'une reconstruction politique. Le chef même des États du Sud, le Président Jefferson Davis, finit par échapper à toute peine. Et telle n'était pas seulement l'idée du Président Johnson après la fin de la guerre, mais encore du Président Lincoln pendant le cours des hostilités.\*

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\* DANA, Note 153, sur WHEATON *Intern. Law*, 296 : "The legal relation of the rebels, who were citizens, was that of criminals, but the political department of the government treated them practically as belligerents."

Tant que dura la guerre civile, les soldats du Sud, faits prisonniers, furent constamment traités en *prisonniers de guerre* et non en criminels, et on appliqua, non les règles du droit pénal, mais les principes du droit des gens militaire. Les célèbres articles de guerre, rédigés par le Professeur Lieber, et que le Président Lincoln prescrivit à l'armée comme instruction à suivre, reposaient dans leur ensemble sur cette pensée fondamentale, qu'il s'agissait d'une guerre conduite d'après le droit des gens, et que l'on avait à combattre une véritable armée ennemie.

Lorsque le Président Lincoln fit déclarer tous les ports du Sud en état de blocus, cette mesure n'eut non plus rien d'exceptionnel, et l'expression de *blocus*, employée par lui, est parfaitement juste. Il s'agissait d'une *mesure de guerre effective et de contrainte militaire*. Il fallait, par le blocus des ports du Sud, empêcher l'ennemi de s'appuyer sur l'Océan pour diriger ses opérations de guerre, et il fallait en même temps porter un coup sensible au commerce du Sud, en interceptant l'exportation, particulièrement du coton, ainsi que l'importation des marchandises dont il avait besoin. Le blocus se rattachait aux autres mesures de contrainte militaire que le Nord mit en œuvre contre le Sud, pour le réduire à se soumettre à l'Union. Précisément parce que la guerre civile avait éclaté, il n'avait pas le caractère d'un blocus pacifique, mais bien d'un blocus entrepris comme il le serait contre toute autre puissance ennemie. Il constituait donc une espèce d'aveu implicite de la part du Nord qu'il était réellement en guerre avec le Sud.

Le blocus appliqué aux ports du Sud n'atteignait pas seulement les habitants des Etats du Sud, c'est-à-dire le pays ennemi, mais encore le *commerce des États neutres*. Les vaisseaux neutres ne pouvaient non plus entrer dans les ports du Sud ni en sortir. S'ils le tentaient néanmoins, ils couraient le risque d'être capturés et condamnés par un tribunal de prises de l'Union. C'est ce qui est arrivé en effet. Des tribunaux de prises Américains ont condamné des vaisseaux neutres. Or une telle rigueur n'était possible qu'en vertu du droit de la guerre et non du droit de la paix.

D'autre part la marine de guerre Américaine pratiqua sur les bâtiments neutres le droit de visite, *tel qu'il n'est autorisé qu'en temps de guerre*. La cour suprême des Etats-Unis eut à examiner le point de savoir si le Président Lincoln pouvait, *sans y être autorisé par une loi*, ordonner le blocus et la saisie sur mer de la propriété ennemie, afin d'exercer le droit de prise. La majorité

résolut affirmativement la question. Mais *tous* les juges suprêmes étaient nnanimes à reconnaître, que ce n'était là autre chose que l'application du droit de guerre international à une guerre civile.\*

Les exemples de blocus pacifique rapportées par le Sénateur Sumner sont d'une nature toute différente. Le blocus pacifique est une *fermeture forcée de ports ennemis, sans guerre*, et non pas "*sans guerre maritime*," comme dit M. Sumner. Lorsque, dans la dernière guerre de la France et de l'Angleterre contre la Russie, on décida de bloquer tous les ports de ce dernier pays, il n'y eut pas de combat naval entre les puissances ennemies, puisque les bâtiments russes n'osèrent pas s'aventurer en pleine mer. Personne néanmoins ne douta que ce blocus ne fût un blocus de guerre ordinaire. C'est précisément l'avantage de la puissance maritime la plus forte d'empêcher l'autre d'occuper la mer, et de la confiner à terre au moyen du blocus.

En outre les "blocus pacifiques," aussi bien que les autres, ne se pratiquent toujours que contre un Etat étranger, ou tout au moins contre une puissance qui de fait se comporte comme un Etat distinct, mais jamais contre les ports de mer de la puissance même qui fait le blocus. Ainsi quand même il faudrait considérer le blocus de Lincoln comme un blocus pacifique,—ce qui dans tous les cas est en contradiction avec la manière dont les opérations militaires ont été conduites à cette époque,—alors encore cette expression impliquerait-elle la reconnaissance, que l'Union avait à combattre un adversaire politiquement organisé.

c. On ne peut davantage contester aux Etats du Sud leur bonne foi au sujet de leur prétendu droit politique.

Depuis de nombreuses années déjà, il existait en Amérique un parti qui considérait comme l'intérêt le plus important qu'il eût à défendre, l'autonomie des Etats particuliers, en opposition avec la souveraineté de l'Union; un autre parti s'attachait au contraire à maintenir avant toutes choses l'unité de l'Union. La politique particulariste trouvait son principal appui dans le Sud, la politique nationale comptait dans le Nord ses plus zélés partisans. L'issue de la guerre civile a donné gain de cause à cette dernière opinion. L'Union est sortie de la lutte plus puissante

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\* Cf. DANA, *Comm. sur WHEATON Intern. Law*, Observ. 135, 296. Diverses opinions d'hommes d'Etat et de jurisconsultes contemporains au sujet de la compétence du président ou du congrès ont été rassemblées par W. B. LAWRENCE, *Obs.* 170 sur WHEATON, IV, 155.

et plus compacte qu'auparavant. Mais, en attendant la solution de ce procès, qui appartient à l'histoire du monde, il était bien possible que certains Etats soutinssent de bonne foi une opinion contraire.

Les Etats du Sud cherchaient en outre à maintenir l'institution de l'esclavage et à la garantir contre les attaques croissantes des habitants du Nord. Sans doute l'esclavage est directement contraire au droit naturel, et est indigne d'une nation libre. Mais quelque abominable qu'il soit, il n'est pas possible de nier que l'esclavage n'existât légalement à cette époque et ne fût protégé comme droit positif dans les Etats du Sud. L'Union elle-même l'avait reconnu comme tel dans une série de dispositions législatives. Dès lors il était tout ou moins compréhensible que les maîtres blancs défendissent leurs prétensions à la propriété de leurs esclaves de couleur. Le Sud luttait pour le droit historique tandis que le Nord combattait pour le droit naturel de l'humanité. Mais une contestation de ce genre entre deux partis est en réalité un vaste différend juridique.

Enfin le Sud, dont la vie économique se rattachait davantage à la culture du sol, et dont la richesse principale consistait en produits naturels, était commercialement intéressé à la modération des tarifs douaniers, tandis que le Nord, plus industriel, sollicitait des droits élevés sur les produits de fabrication étrangère. Il était également possible d'entrer de bonne foi en discussion sur ces intérêts contradictoires.

Si l'on tient compte de toutes ces considérations, on arrive à la conclusion suivante. C'est que, à considérer d'un point de vue *impartial*, tel qu'il s'offrait et s'imposait aux Etats *Européens*, en présence de la situation que créaient les faits, la lutte engagée entre l'Union et la Confédération, c'est-à-dire entre le Nord et le Sud, il était absolument impossible de ne pas admettre que les Etats-Unis fussent alors engagés dans une *grande guerre civile*, où les deux partis avaient le caractère de puissances politiquement et militairement organisées, se faisant l'une à l'autre la guerre, suivant le mode que le droit des gens reconnaît comme régulier, et animées d'une égale confiance dans leur bon droit. Les uns pouvaient éprouver plus de sympathie pour l'Union, qui avait pour elle toute la supériorité d'un Etat reconnu et d'une autorité constitutionnelle, d'autres pouvaient faire des vœux pour le succès de la Confédération, qui n'était pas encore reconnue comme Etat fédéral nouveau, mais qui espérait de se conquérir une ex-

istence propre. *Tout le monde* était d'accord qu'il y avait *guerre* et que, dans cette guerre, il y avait deux *parties belligérantes*.

Mais voilà, et voilà seulement ce que les cabinets de France et d'Angleterre ont présumé, en reconnaissant la Confédération *comme étant de fait une puissance belligérante*. Je ne puis donc en aucune façon y voir une injustice, une violation de droit *prati-*quée au détriment de l'Union. Que la déclaration ait été faite un peu plus tôt ou un peu plus tard, c'était là une question qui regardait la politique, non le droit. Qu'elle ait été faite, et faite donc ce sens, on ne peut y voir que *l'expression légitime de l'opinion d'États tiers et désintéressés*.

### 3.—OPINIONS SCIENTIFIQUES SUR LA GUERRE CIVILE.— PRATIQUE MODERNE.

Pour compléter l'exposé qui précède, nous rappellerons encore les paroles de quelques auteurs qui ont écrit sur le droit des gens. Cet examen montrera que l'ancienne théorie, qui refusait de reconnaître les rebelles comme véritables belligérants, a insensiblement fait place au système contraire, plus humain et plus libéral.

*Hugo Grotius* ne se montre pas encore favorable au parti insurgé. Bien qu'il donne à leur lutte contre le pouvoir existant le nom de *bellum* (guerre), il n'y voit pas pour cela un véritable *bellum publicum*, tel qu'il en peut exister entre deux États étrangers. Il ne la considère que comme *bellum mixtum*, c'est-à-dire comme une guerre qui est *bellum publicum* de la part du pouvoir, mais qui n'est qu'un *bellum privatum* illicite de la part des insurgés.\* Il est vrai qu'il néglige de déduire les conséquences de son système. Peut-être le souvenir des cruautés du duc d'Albe, qui avait en vain tenté de ramener, à l'aide du bourreau, les Pays-Bas à l'obéissance, l'a-t-il empêché de prendre la défense de la répression pénale. Mais telle est inévitablement la conséquence logique du principe qu'il pose.

*Vattel* s'exprime déjà sur ce point, comme sur beaucoup d'autres, dans un sens beaucoup plus libéral et plus humain. Il distingue "l'émotion populaire," la "sédition" et le "soulèvement" de la "guerre civile." Il admet avec raison qu'au commencement, aussi longtemps qu'une fraction peu importante de la

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\* *De jure belli ac pacis*, I, III, 1, I, et I, IV, 1, 19.



population seule prend part au mouvement, le droit pénal doit être appliqué, bien que, même dans ce cas, il recommande aux gouvernements d'examiner consciencieusement les motifs du mécontentement populaire, de s'efforcer de les écarter et d'user d'indulgence envers des sujets égarés (III, 18, p. 287-291). Mais dès que les insurgés combattent pour leur droit (quand même celui-ci ne serait que problématique), et que leur nombre s'accroît jusqu'à former une véritable force militaire, il y a, à ses yeux, *guerre civile*, et il en est ainsi, alors même que tous les torts sont de leur côté, et le droit exclusivement du côté du gouvernement. "Le prince ne manque pas d'appeler *rebelles*, tous sujets qui lui résistent ouvertement; mais quand ceux-ci deviennent *assez forts* pour lui faire tête, pour *l'obliger à leur faire la guerre régulièrement*, il faut bien qu'il se résolve à souffrir le mot de guerre civile." (III, 18, §292.) Vattel en conclut que, dans la guerre civile *deux partis indépendants, deux corps séparés* sont en présence, et que tous deux doivent également agir selon les lois communes de la guerre. (Ibid. §§293, 294).

Phillimore n'examine pas spécialement la question de l'existence des partis ennemis dans une guerre civile. Mais, en parlant de la guerre Anglo-Américaine de 1776-1783, il approuve pourtant la pratique la plus humaine, qui consiste à traiter les insurgés en belligérants. Il s'étend longuement aussi (vol. III, p. 229 seq.) sur la façon consciencieuse dont le gouvernement Anglais a observé ses devoirs de neutralité dans la guerre civile du Portugal de 1828-29. Voici le cas :

Don Pedro, Empereur du Brésil, avait renoncé à la couronne de Portugal en faveur de sa fille Dona Maria II. Celle-ci fut reconnue comme souveraine légitime du Portugal par les puissances Européennes, et en particulier par la Grande-Bretagne. Mais le frère de Don Pedro, Don Miguel, soutenu par le parti des absolutistes, lui disputa la couronne, ce qui occasionna une guerre civile dans le Portugal. Bien que le gouvernement Anglais considérât à bon droit l'infant Don Miguel comme usurpateur, et Dona Maria comme reine, il n'en déclara pas moins dès que les hostilités eurent pris le caractère d'une véritable guerre civile, qu'il garderait la *neutralité entre les deux belligérants*. Il ordonna aux partisans de la reine qui étaient venus chercher un refuge en Angleterre, de s'éloigner des côtes, et ne leur permit point de faire du territoire Anglais le point de départ d'expédition militaire. Lorsqu'une expédition de cette nature se prépara, sous le

commandement du comte Portugais Saldanha, et fit voile de Plymouth à Terceira sur quatre vaisseaux marchands, le simple soupçon que cette entreprise avait pour objet une descente en Portugal suffit pour déterminer le gouvernement Anglais à s'y opposer de force. Il envoya le capitaine Walpole avec des navires de guerre Anglais à la poursuite des bâtiments Portugais, pour empêcher ceux-ci d'aborder même à l'île de Terceira, restée fidèle à reine, et les força à renoncer à toute tentative de descente sur le sol Portugais. La conduite du gouvernement fut, il est vrai, critiquée dans le parlement Anglais, par plusieurs orateurs, et entre autres par le Dr. Phillimore lui-même, principalement par la raison qu'ils voyaient une atteinte à la souveraineté étrangère et une usurpation injustifiable, dans l'attaque dirigée en pleine mer,—puis dans les eaux d'un Etat souverain étranger, avec le gouvernement duquel la Grande-Bretagne était en bonne intelligence,—contre des vaisseaux non-armés et leurs passagers. Les deux chambres du parlement approuvèrent cependant, à une grande majorité, la conduite du gouvernement, convaincues que celui-ci s'était borné à observer dans toute leur étendue les devoirs de la neutralité.

H. Wheaton admet aussi d'une manière très positive, dans ses *Elements of International Law* (IV, 1. §7), que les partis en lutte dans une guerre civile sont de vrais belligérants. "Une guerre civile entre les différents membres de la même société est ce que Grotius appelle une guerre *mixte*; elle est, selon lui, *publique* de la part du gouvernement établi, et *privée* de la part du peuple qui résiste à son autorité. Mais l'usage général des nations regarde une pareille guerre comme donnant à *chacune des deux parties combattantes tous les droits de la guerre l'une contre l'autre, et même par rapport aux nations neutres*."

Les commentateurs de Wheaton à leur tour soutiennent la même opinion dans leurs notes. W. B. Lawrence (observ. 171) invoque en outre l'autorité de deux auteurs Espagnols: RIQUELMA. *Elementos de Derecho publico*, C. XIV, et BELLO, *Principios de Derecho intern.* C. 10, lesquels déclarent également que les partis insurgés et militairement organisés doivent, en vertu du droit des gens, être considérés comme belligérants. Il observe enfin que le droit public de l'Angleterre autorise la poursuite criminelle du chef de trahison (*treason*), alors même que le crime a été commis non contre le roi *de jure*, mais contre le roi *de facto*.

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\* V. Wheaton, 4me Ed. Française 1864, 1. I, p. 278.

*R. H. Dana* (obs. 158) fait encore remarquer, à l'appui du même principe, que les autorités militaires aussi bien que le gouvernement politique de l'Union, ont considéré et traité les rebelles des Etats du Sud comme partie belligérante, et que les condamnations judiciaires isolées qui, contrairement, à ce principe, ont prononcé l'application de peines, n'ont jamais été suivies d'exécution.

*Heffter* (*Völkerr.* II, p. 114), qui rejette en principe l'application des lois de la guerre aux événements intérieurs des Etats, reconnaît pourtant qu'une guerre engagée entre les partis politiques d'un même Etat peut, sous l'empire de la *nécessité* ("als *Nothkrieg*"), prendre le caractère d'une guerre régulière.

*Bluntschli* (*Das moderne Völkerrecht*, p. 512) reconnaît la force militaire qui s'est donné une organisation propre comme puissance belligérante, lorsque, "à l'instar d'un Etat distinct (*an States Statt*), elle lutte de bonne foi pour la défense de son droit politique," et, bien qu'il considère (p. 514) la guerre entre l'Union ou le gouvernement fédéral d'une part et les divers Etats opposants d'autre, comme une guerre d'exécution (*Executionskrieg*), et non comme une guerre proprement dite selon le droit des gens, il est pourtant d'avis que, même dans ce cas, le droit des gens moderne "envisage les deux partis comme belligérants, dans un intérêt d'humanité."

Enfin l'auteur le plus récent qui ait écrit sur le droit des gens *F. von Holtzendorff* (*Encyclop. der Rechtswiss.*, I, p. 807) dit : "A la fin du moyen-âge on ne trouve plus comme sujets du droit de la guerre, que des Etats ou encore, *dans la guerre civile, un parti* qui saisit les armes dans le but avoué de se séparer et de constituer une fraction du territoire en Etat indépendant,\* lorsque, après s'être soustrait à la puissance de compression de la loi pénale, il paraît assez fort pour soutenir une lutte régulière en observant toutes les lois de la guerre. Un parti insurgé qui se trouve dans ces conditions peut être considéré *par les neutres* comme *force belligérante*, en quelque sorte par anticipation, de l'organisation définitive à laquelle il aspire."

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\* Ces fins ne sont pas les seules que l'on puisse se proposer dans une guerre civile, mais elles suffisent à la solution de la question que nous examinons.

## 4.—LA NEUTRALITÉ DE L'ANGLETERRE.

M. Sumner critique aussi dans son discours la qualification d'Etat neutre donnée à la Grande-Bretagne. La neutralité des Etats tiers n'a de sens selon lui lorsque, entre deux autres Etats régulièrement constitués et indépendants, il s'élève une guerre à laquelle les Etats neutres ne prennent point de part. Mais il ne peut être question de neutralité, lorsqu'une seule des parties en guerre est un Etat reconnu, tandis que l'autre est un amas de rebelles. Là les parties se trouvent dans une position inégale, et la déclaration de neutralité n'a été dès le principe qu'un acte tendant à favoriser les rebelles, et à leur attribuer une parité de droits qu'ils n'avaient point antérieurement.

La neutralité est tout d'abord une conception négative. Elle signifie d'avance *non-participation* à la guerre. Toute guerre présuppose au moins deux parties combattantes : sont neutres tous les Etats qui n'appartiennent à aucune de ces parties (*qui neutrarum partium sunt*, comme disait Grotius). En règle générale la guerre n'est engagée qu'entre Etats indépendants et reconnus, se trouvant sous ce rapport sur la même ligne. Mais dans la guerre civile, où il n'y a pas égalité entre les parties par rapport à leur reconnaissance comme Etats, on rencontre pourtant aussi des *parties belligérantes* qui, en cette qualité, doivent être traitées sur le même pied au point de vue militaire et en ce qui concerne les lois de la guerre. La puissance tierce et pacifique, qui ne se prononce pour aucun des deux belligérants et ne prend aucune part à la guerre, est nécessairement par cela même une puissance neutre. Les conditions naturelles de la neutralité sont : la guerre et l'existence de parties belligérantes, vis-à-vis desquelles les Etats neutres affirment et défendent, dans la mesure du possible, les droits résultant pour eux de leur position pacifique. Toute guerre compromet aussi les intérêts des neutres, bien que ceux-ci ne soient point en faute. Les malheurs et les désastres qu'elle amène n'atteignent pas uniquement les parties belligérantes. Mais il est du moins à souhaiter que l'on puisse les circonscrivre dans des limites étroites, et que les droits et les intérêts des nations pacifiques soient protégés autant que possible, même durant la guerre que se font d'autres peuples. La déclaration de neutralité, et le maintien de celle-ci par les Etats qui ne prennent aucune part aux hostilités, et qui par cela même sont neutres,—ont précisément cette protection en vue.

Il est d'ailleurs incontestable que la déclaration de neutralité faite par des Etats tiers vis-à-vis de deux partis engagés dans une guerre civile, profite plus au parti insurgé qu'au parti en possession du pouvoir gouvernemental reconnu, et déjà admis dans le droit des gens comme individualité politique. Le premier est désormais reconnu dans le droit international, non, il est vrai, comme Etat nouveau, mais du moins comme véritable belligérant, faisant la guerre comme un Etat, exerçant des attributions et assumant des obligations internationales. Il ne faut cependant pas perdre de vue que la déclaration de neutralité n'a *nullement* le sens d'une marque de *faveur* accordée au parti insurgé, mais qu'elle est simplement une conséquence du fait que, sans le concours, sans la participation des Etats neutres, *il y a là une vraie guerre civile entre deux forces belligérantes*. Lorsqu'un parti insurgé, quelque condamnable que puisse être sa conduite, d'après le droit historique et la constitution du pays, est devenu assez puissant pour n'être plus considéré comme une bande de rebelles, mais se présente de fait comme une puissance belligérante, les conséquences simultanées de ce fait sont :

1. Que le parti constitutionnel, investi du pouvoir légitime, doit également traiter l'autre comme belligérant ;

2. Que les Etats tiers sont à l'égard des deux partis dans la situation de puissances neutres. De même que, dans le droit interne les lois *pénales* font place aux lois de la guerre, de même dans le droit international, ce sont les lois de la neutralité qui prennent le dessus.

• C'est un fait historique remarquable, que la première déclaration de neutralité armée de 1780 se soit produite à l'époque de la guerre Anglo-Américaine. Au point de vue Anglais cette guerre était aussi une guerre civile. Comme aucun Etat, à l'exception de la France, n'avait encore reconnu les colonies soulevées comme un Etat nouveau, la guerre n'avait encore, aux yeux des autres Etats neutres, que le caractère d'une guerre civile. A la vérité, la France et l'Espagne étaient alors également entrées en lutte avec l'Angleterre. Toutefois l'Amérique fut le théâtre principal de la guerre, et les puissances neutres : la Russie, la Prusse, l'Autriche, le Portugal, etc., entendirent clairement appliquer leur déclaration de neutralité aux colonies Américaines, ou, comme elles se présentaient alors en fait, aux Etats-Unis d'Amérique, car l'ensemble des Etats neutres reconnaissait en eux une puissance belligérante, sinon un nouvel Etat déjà défini-

tivement établi. Il existait donc dès-lors une neutralité des Etats Européens, non-seulement à l'égard de deux Etats étrangers indépendants, mais à l'égard de deux partis engagés dans une guerre civile.

5.—VIOLATION DES DEVOIRS D'UN ETAT NEUTRE DE LA  
PART DU GOUVERNEMENT ANGLAIS, PAR L'ARMEMENT  
DE L'ALABAMA.

Le principal grief des Etats-Unis contre la Grande-Bretagne se rapporte à l'armement sur territoire Anglais du corsaire sudiste l'Alabama.

Les faits allégués à l'appui de ce grief sont formulés comme suit dans les discours de M. Sumner :

10. A l'époque où le navire se trouvait encore dans les chantiers de Liverpool, on savait qu'il était destiné à faire la course, au service des Etats du Sud, dans la guerre Américaine. Bien que l'ambassadeur Américain à Londres et le consul Américain à Liverpool eussent, chaque jour, signalé le danger au gouvernement Anglais et aux autorités Anglaises, bien qu'ils eussent requis la saisie du corsaire, celui-ci put néanmoins quitter Liverpool sans être inquiété. L'ordre de l'arrêter n'arriva à Liverpool que lorsqu'il était trop tard.

20. Le corsaire sudiste trouva, après sa sortie, un refuge dans un port peu connu du pays de Galles, appelé Moelfrabay ; il y resta pendant 36 heures dans les limites du territoire Anglais, depuis le 29 Juillet, 1862, à 6½ heures du soir, jusqu'au 31 Juillet, à 3 heures du matin. Pendant ce temps l'Alabama reçut son équipage, que lui amena le vapeur anglais *Hercules*, sorti de Liverpool en même temps que l'Alabama. Tout cela s'accomplit sans entrave de la part des autorités Anglaises, bien que l'équipage et l'armement du vaisseau dussent, à n'en pouvoir douter, recevoir une destination guerrière.

30. Plus tard encore le corsaire sudiste, dont l'évasion était, selon l'expression du ministre Anglais Lord Russell, "un scandale," arriva plus d'une fois à la portée des navires de guerre Anglais, sans que ceux-ci opérassent saisie sur lui. Il fut accueilli à diverses reprises dans des ports Anglais, sans que les autorités maritimes Anglaises fissent mine de l'arrêter. C'est ainsi que, pendant six jours, il put séjourner librement dans le port Anglais de Kingston en Jamaïque.

40. L'Alabama était un vaisseau Anglais par son origine, par sa construction, par son armement et par son équipage; il n'était Américain qu'en tant qu'il était commandé par un rebelle commissionné par le gouvernement des Etats du Sud. Vis-à-vis d'un état ami, comme l'Union, c'était là un acte d'hostilité de la part de l'Angleterre. C'est ce que démontra encore plus clairement l'avantage remporté par le constructeur de l'Alabama, dans la chambre des communes, sur M. Bright, qui s'était prononcé en faveur de l'Amérique.

50. La violation des devoirs d'un état ami, dont l'Angleterre se rendit coupable lors de l'équipement de l'Alabama, fut la circonstance la plus éclatante, mais non la seule dans laquelle se révélèrent les dispositions hostiles du gouvernement Anglais. Il y eut encore d'autres croiseurs sudistes du même genre. Les nombreux coureurs de blocus qui transportaient en même temps de la contrebande de guerre avaient tous également leur origine et leurs propriétaires en Angleterre. Partout où les troupes de l'Union finirent par l'emporter et s'emparèrent des places ennemies, elles trouvèrent des armes Anglaises et des canons Anglais.

Tous les faits ainsi allégués n'ont pas la même importance. Mais plusieurs d'entre eux, si tant est qu'il faille les tenir pour avoués ou prouvés,—ce dont nous n'avons pas à juger ici,—doivent certainement être considérés comme constituant une infraction aux devoirs d'un État neutre.

L'État neutre qui veut garantir sa neutralité, doit s'abstenir d'aider aucune des parties belligérantes dans ses opérations de guerre. Il ne peut prêter son territoire pour permettre à l'une des parties d'organiser en lieu sûr des entreprises militaires. Il est obligé de veiller fidèlement à ce que des particuliers n'arment point sur son territoire des vaisseaux de guerre, destinés à être livrés à une des parties belligérantes (BLUNTSCHLI, *Modernes Völkerrecht*, § 763).

Ce devoir est proclamé par la science, et il dérive tant de l'idée de neutralité que des égards auxquels tout État est nécessairement tenu envers les autres États, avec lesquels il vit en paix et amitié.

La neutralité est la *non participation* à la guerre. Lorsque l'État neutre soutient un des belligérants, il prend part à la guerre en faveur de celui qu'il soutient, et dès lors *il cesse d'être neutre*. L'adversaire est autorisé à voir dans cette participation un acte d'hostilité. Et cela n'est pas seulement vrai quand l'État neutre livre lui-même des troupes ou des vaisseaux de guerre, mais aussi

lorsqu'il prête à un des belligérants un appui *indirect* en permettant, *tandis qu'il pourrait l'empêcher*, que, de son territoire neutre, on envoie des troupes ou des navires de guerre.

Partout où le droit de neutralité étend le cercle de son application, il restreint les limites de la guerre et de ses désastreuses conséquences, et il garantit les bienfaits de la paix. Les devoirs de l'État *neutre* envers les *belligérants* sont en substance les *mêmes* que ceux de l'État *ami*, *en temps* de paix, vis-à-vis des autres États. Aucun État ne peut non plus, *en temps de paix*, permettre que l'on organise sur son territoire des agressions contre un État ami. Tous sont obligés de veiller à ce que leur sol ne devienne pas le point de départ d'entreprises militaires, dirigées contre des États avec lesquels ils sont en paix.

Ces devoirs internationaux universels sont aussi consacrés, dans le droit public interne, par les législations Anglaise et Américaine. La loi Anglaise du 3 Juillet, 1819, contient à ce sujet (art. 7) la disposition suivante :

" And be it further enacted, that if any person within any part of the United Kingdom or in any part of His Majesty's dominion beyond the seas, shall, without the leave and licence of His Majesty for that purpose first had and obtained as aforesaid, equip, furnish, fit out or arm or attempt or endeavour to equip, furnish, fit out, or arm, or procure to be equipped, furnished, fitted out or armed, or shall knowingly aid, assist or be concerned in the equipping, furnishing, fitting out, or arming of any ship or vessel, with intent or in order that such ship or vessel shall be employed in the service of any foreign prince, state or potentate, or of any foreign colony, province or part of province, or people, or of any person or persons exercising or assuming to exercise any powers of government in or over any foreign state, colony, province, or part of any province or people, as a transport or store ship, or with intent to cruise or commit hostilities against any prince, state or potentate, or against the persons exercising or assuming to exercise the powers of government in any colony, province or part of any province or country, or against the inhabitants of any foreign colony, province or part of any province or country, with whom His Majesty shall not then be at war. . . . "

Cette loi défend incontestablement tout appui prêté en cas de guerre, peu importe que les parties belligérantes soient des États étrangers reconnus, ou des usurpateurs du pouvoir, ou des colonies ou des provinces révoltées. Donc le gouvernement Anglais, en permettant intentionnellement ou par une négligence évidente,—alors qu'il aurait pu et dû l'empêcher,—l'équipement



de l'Alabama, a méconnu du même coup un devoir international à l'égard de l'Union Américaine et les prescriptions d'une loi nationale. Par ces motifs il est aussi, d'après les règles du droit des gens, responsable envers l'État lésé.

Il est notoire que la loi Anglaise est une imitation de la loi Américaine de 1818, sur la neutralité, laquelle ne faisait elle-même que réviser et rétablir la loi antérieure de 1794. C'est même précisément la question de l'équipement de corsaires sur un territoire neutre, au profit d'une partie belligérante, qui donna la première impulsion à cette législation. En 1793 l'Angleterre qui était à cette époque en guerre avec la France, se plaignit de ce qu'à New York on équipât des corsaires Français, pour nuire au commerce maritime Anglais. Le Président Washington sévit avec une grande énergie contre cette violation de la neutralité et, malgré la sympathie de la population Américaine pour les Français, malgré les démarches de l'ambassadeur Français Genet, il fit saisir les corsaires. Il empêcha de la même manière la construction, en Géorgie, d'un corsaire destiné à entraver la navigation Française. Des deux côtés, il observa consciencieusement et raisonnablement les devoirs d'un État neutre, et détermina ensuite le Congrès à régler ces devoirs par voie législative.\*

Le ministre libéral Canning invoqua dans le Parlement Anglais, en 1823, cette honorable attitude de Washington, pour défendre de son côté la loi Anglaise sur la neutralité contre les attaques d'hommes politiques passionnés ou de particuliers égoïstes.†

L'opinion du monde savant et du monde politique éclairé est presque unanime à reconnaître ces principes, que le peuple Américain et son premier président ont l'honneur d'avoir proclamés avant tous les autres, dans des textes de lois clairs et formels.

#### 6.—EXPLOITS DES CORSAIRES SUDISTES.

L'activité du corsaire l'Alabama fut au plus haut degré funeste et désastreuse : il détruisit nombre de navires de commerce Américains avec leurs cargaisons. Les procédés auxquels il se permit de recourir pour arriver à ses fins, étaient d'autant plus barbares et plus pernicieux que les ports de la partie belligérante, à laquelle

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\* BEMIS, *American Neutrality*, Boston, 1866, p. 17 seq.

† PHILLIMORE, *Intern. Law*, III, 217.

il appartenait, étaient bloqués, et que l'application de la procédure des tribunaux de prises, était dès-lors impossible.

La guerre navale moderne est, sous un certain rapport, encore moins conforme que la guerre continentale aux progrès de la civilisation et aux principes du droit naturel. La première notamment ne respecte la propriété privée ni des vaisseaux ennemis ni des marchandises ennemis, mais les considère comme de bonne prise, tandis que la seconde sait plus équitablement distinguer entre la propriété publique et la propriété privée, et qu'elle a définitivement repoussé l'antique droit de butin comme une institution barbare équivalant au brigandage. L'idée si naturelle que les États font la guerre *contre les États* et non *contre les personnes privées*, et que par suite la guerre n'a pas pour effet de suspendre le droit privé, mais seulement d'en restreindre parfois l'application lorsque la nécessité l'exige, cette idée est, il est vrai, approuvée aujourd'hui, du moins en principe, par plusieurs puissances maritimes, mais elle n'a pas encore, surtout à cause de l'opposition de l'Angleterre, réussi à se faire reconnaître d'une manière générale soit par voie de traités, soit dans la pratique internationale.

Mais il y a un danger plus grave que celui dont les vaisseaux de guerre proprement dits menacent la marine marchande : c'est celui qui provient des bâtiments armés en course. Les capitaines et équipages des navires de guerre sont appelés par profession et sont même enclins, par le sentiment de l'honneur militaire, à disputer la victoire à la marine de guerre ennemie, plutôt qu'à faire la chasse à d'inoffensifs bâtiments de commerce. Les corsaires au contraire ne sont autre chose que des pirates privilégiés, dont les équipages, étrangers au sentiment de l'honneur militaire, poussés par l'amour égoïste du lucre, profitent des temps de guerre pour s'approprier de force les biens des étrangers. Ce fut donc un progrès de la civilisation sur la barbarie et du droit moderne sur une iniquité traditionnelle, lorsque, au congrès de Paris de 1856, les puissances Européennes convinrent d'interdire la course dans les guerres maritimes. L'Union Américaine refusa alors d'accéder à cette interdiction, par le motif que l'on ne proscrivait pas en même temps d'une manière absolue le butin fait sur mer dans les guerres maritimes : mais ce refus d'accepter le *bien*, fondé sur ce qu'on ne pouvait pas encore obtenir le *mieux*, eut pour les États-Unis les conséquences les plus graves. S'ils s'étaient alors ralliés à l'interdiction de la course, l'armement de vaisseaux corsaires eût été difficilement tenté en Angleterre pendant la guerre

civile d'Amérique, car c'eût été là un encouragement public donné à la piraterie.

Mais l'œuvre ruineuse de ces pirates privilégiés atteignit certainement son comble, lorsque l'on vit lancer comme corsaire un vaisseau qui se proposait directement la destruction de toute propriété privée ennemie qu'il saisirait sur mer, et qui par cela menaçait en même temps la vie de tout le paisible personnel même des vaisseaux de commerce ennemis. Au danger du vol se joignait celui de l'anéantissement de biens précieux, et même de l'assassinat.

Lorsqu'un État, fût-ce même par simple *défaut de surveillance*, a rendu possible et toléré la sortie d'un semblable corsaire, au préjudice d'un État ami, c'est là dans tous les cas *une faute très grave*, pour laquelle l'État lésé est bien autorisé à demander réparation.

Du reste la destruction de navires Américains et de leurs chargements n'est pas le seul dommage réel qui tombe à charge de l'Alabama, et des autres corsaires du même genre. Un autre résultat, à la vérité seulement *indirect* et comme tel plus éloigné, mais qui pèse plus lourdement encore dans la balance, fut le défaut de sécurité qui atteignit la marine Américaine toute entière, et produisit chez elle une frappante diminution. S'il peut être inexact d'attribuer exclusivement à cette cause la stagnation où tomba en Amérique l'industrie de la construction navale, la mise en vente d'un nombre considérable de navires Américains, et le mouvement sensiblement rétrograde de tout le commerce maritime des États-Unis, au moment où celui de l'Angleterre se développait, il n'est pas douteux cependant que la terreur, inspirée aux vaisseaux marchands Américains par les corsaires sudistes, n'ait été une des principales causes de cette calamité nationale. On peut différer d'avis sur l'étendue et l'importance de ce dommage; mais personne ne contestera que la guerre de rapine et de destruction, entreprise par ces croiseurs sur toute l'étendue des mers, n'ait fait au commerce maritime et à la marine de l'Amérique de très profondes blessures.

Dans tous les cas, la troisième conséquence signalée par M. Sumner est encore plus indirecte et plus éloignée. Il s'agit de la *prolongation* de la guerre Américaine, et, par suite, de l'*augmentation* des sacrifices déjà gigantesques de personnes et de biens qu'a entraînés la guerre civile. Les croiseurs sudistes peuvent y avoir contribué en quelque chose, mais il sera bien difficile

d'arbitrer quelle est la part du mal qu'il faut mettre à leur charge et quelle part il faut imputer à d'autres causes. Du reste la corrélation entre cette conséquence et les causes des expéditions dévastatrices des croiseurs est si vague et si incertaine, qu'il ne serait pas aisé d'en faire le point d'appui d'une demande judiciaire.

Il ne faut d'ailleurs pas perdre de vue que tous ces effets désastreux sont en premier lieu imputables, non pas au gouvernement Anglais, mais aux *croiseurs eux mêmes*. Personne n'accusera le gouvernement Anglais d'avoir donné mission de détruire les navires de commerce Américains ou d'avoir, par ses agissements, entravé ou endommagé la marine Américaine. Ce que l'on peut lui reprocher à bon droit, en supposant que les faits cités plus haut doivent être considérés comme avoués ou prouvés, ce n'est pas un *fait*, mais une *omission contraire au droit*. Sa faute ne consiste pas à avoir équipé et appareillé les corsaires, mais à *n'avoir pas empêché* leur armement et leur sortie de son territoire neutre. Mais cette *faute* n'a qu'un rapport *indirect* et nullement un rapport *direct* avec les déprédations réellement commises par les croiseurs.

#### 7.—RÉCLAMATIONS PRIVÉES EN DOMMAGES-INTÉRÊTS.

A en croire plusieurs orateurs et écrivains Américains, il irait de soi que le gouvernement de la Grande-Bretagne serait obligé de dédommager au moins les particuliers dont la propriété aurait été détruite par l'Alabama (ainsi que par la "*Floride*" ou d'autres corsaires sudistes).

A mon avis, ce point est loin d'être entièrement évident, et l'on pourrait singulièrement se tromper en se fiant trop au succès réservé à ces réclamations privées devant un tribunal arbitral.

Si l'Union ne prend pas, comme État, ces réclamations privées sous sa protection, et si elle ne fait pas consister dans leur équitable apaisement, la satisfaction que les États-Unis ont droit de réclamer de la Grande-Bretagne, dans ce cas les particuliers intéressés n'ont absolument aucune perspective de dédommagement. D'après les règles du droit privé ordinaire, leurs prétentions seraient tout-à-fait vaines. Nulle part ils ne trouveraient un juge qui condamnerait le gouvernement Anglais à payer une indemnité.

On sait que, dans le droit romain écrit, dont les principes sont encore reconnus, d'après M. Sumner, dans le droit international

moderne, la loi Aquilia accorde une action générale en dommages-intérêts, même du chef de préjudice causé *par négligence*. Dans le principe, l'action *ex legi Aquilia* n'était donnée que dans le cas d'un "*damnum corpore corpore datum*," c'est-à-dire quand, par des moyens matériels, on avait causé un dommage matériel (par exemple la mort ou les blessures occasionnées à un esclave, la destruction d'un objet). La loi statuait comme suit (cap. 3) : "*Ceterarum rerum, praeter hominem et pecudem occisos, si quis alteri damnum faxit, quod usserit, fregerit, ruperit injuria, quanti ea res erit—tantum aes domino dare damnas esto.*" (L. 27, § 5. Dig. ad legem Aq. IX, 2.) Plus tard l'action fut étendue, et on accorda tout au moins une *actio utilis ex lege Aquilia* dans une série d'autres cas, où le dommage n'avait pas été occasionné immédiatement par une action matérielle, mais par une négligence se rattachant à un acte positif du défendeur. Lorsque, par exemple, un chirurgien a fait avec succès une opération chirurgicale à un esclave, mais néglige ensuite le patient, qui meurt faute de soins médicaux, ou lorsque quelqu'un, après avoir allumé un feu dans des conditions normales, omet imprudemment de veiller à ce qu'il ne se communique pas aux objets environnants, en sorte que le feu, livré à lui-même, finit par prendre à une maison voisine, dans ces cas l'*actio legis Aquilia* est accordée. (L. 8, pr. ad leg. Aq; L. 27, § 9 *eod*; § 5, 6, I. *eod*.)

Mais on ne peut admettre que *jamais* les Romains soient allés si loin que d'accorder l'action aquilienne, du chef d'un dommage résultant d'une simple omission (V. VANGEROW, *Pandekten*, 7th éd. 1869, vol. III, p. 582).

WINDSCHEID (*Pandektenrecht*, 1866, vol. II, Abth. 2, page 298) dit également : "Le dommage doit être occasionné par un acte positif; une omission oblige seulement en tant que l'action était commandée par un fait antérieur ou simultané." (Cf. L. 13, § 2, *Dig. de usufr. VII, 1.*)

Or, de quoi peut-on accuser le gouvernement Anglais, si ce n'est d'une simple omission? L'action de la loi aquilienne ne serait donc pas recevable contre lui.

Les législations modernes consacrent en cette matière des principes conformes au droit romain. (*Preussisches Landrecht*, I. 6, § 8 et ss.—*Code civil*, art. 1382 et ss.—*Code autrichien*, § 1294 et ss.—*Code de Zurich*, § 1837.)

*Blackstone* (*Comm.* III, p. 218, seq.) restreint de la même manière l'action fondée sur la nuisance.

La non-recevabilité d'une action individuelle du chef des dommages occasionnés aux propriétés privées, devient encore plus évidente, lorsqu'on envisage la question de savoir si les propriétaires lésés pourraient efficacement poursuivre en dommages-intérêts le constructeur, ou les personnes qui ont pris une part directe à l'armement de l'Alabama. Je doute qu'aucun jurisconsulte réponde affirmativement à la question, et cependant les *agissements* de ces personnes ont un rapport bien plus intime avec les dommages occasionnés par les corsaires, que le simple fait d'*omission* reproché au gouvernement. Le constructeur et les armateurs pouvaient prévoir que le corsaire construit et armé par eux accomplirait des opérations dommageables; à coup sûr ils étaient responsables envers leur propre gouvernement de cette aide accordée à une partie belligérante, et ils pouvaient en Angleterre être traduits devant les tribunaux et punis du chef d'infraction à la loi de neutralité. Mais si les propriétaires des vaisseaux Américains détruits voulaient poursuivre les mêmes personnes en dommages-intérêts, elles pourraient répondre : " Nous nous sommes bornés à livrer aux belligérants du Sud un instrument de guerre, nous mêmes n'avons fait de cet instrument aucun usage nuisible. Nous ne sommes donc pas responsables de dommages qui ne sont pas de notre fait ; c'est à la partie belligérante qui a acheté l'instrument et s'en est servi dans le but qu'elle même a voulu et jugé convenable, à répondre de cet usage."

Or, s'il n'est pas possible d'obliger le constructeur de l'Alabama à payer des indemnités, combien moins encore peut-on en réclamer du gouvernement, qui a seulement omis d'interdire au constructeur de livrer son œuvre ?

En outre, ce qui s'oppose à toute demande pareille en dommages-intérêts, c'est le principe reçu dans le droit de la guerre, que les dommages causés par les belligérants dans le cours de celle-ci, ne peuvent plus, en règle générale, une fois les hostilités terminées et la paix conclue, servir de texte à des réclamations privées. Des considérations fondées sur les désastres inévitables de la guerre, ainsi que sur les intérêts considérables de la paix et du rétablissement de la sécurité juridique, ont fait admettre que les États couvrent du manteau de l'amnistie les dégâts causés pendant la guerre, et ne tolèrent plus de demandes rétrospectives de ce chef. Mais s'il n'est pas possible d'actionner, après la conclusion de la paix, les anciens ennemis qui ont directement et intentionnellement causé ces dégâts, il est naturel que l'action

soit encore moins recevable contre des neutres, qui n'ont favorisé ce préjudice et n'y ont contribué que d'une manière tout au plus indirecte, peut-être même par simple négligence.

Les propriétaires Américains lésés ne peuvent donc espérer quelque réparation que si l'Union elle-même, comme Etat, prend leur cause en main et transforme, au moins partiellement, les *réclamations privées* en une *réclamation nationale*, en ce sens qu'elle cherche à faire valoir la réparation qui lui est dûe, sous la forme d'une *indemnité à ses citoyens lésés*.

#### 8.—DES PRÉTENTIONS DE L'UNION A UNE RÉPARATION.

D'après les observations qui précèdent, tout le débat se résume non pas en un litige entre des particuliers auxquels la guerre a causé des pertes, et l'Etat de la Grande-Bretagne que l'on veut rendre responsable de celles-ci,—mais en un litige entre la fédération des États-Unis d'un côté et la Grande-Bretagne de l'autre. Et ce qui fait l'objet du litige, ce n'est pas un dommage matériel, mais la *non-observation des devoirs internationaux de la part d'un État ami et neutre*.

Il s'en suit qu'une satisfaction, qu'elle soit exigée ou qu'elle soit offerte, peut être stipulée ou accordée, sous des formes très diverses.

Dans les premières phases de la négociation, il a été question :

1o. *D'une cession de territoire* à titre de réparation, et

2o. *Du paiement d'une certaine somme d'argent*, dont le montant serait fixé, soit d'une manière toute générale et sans égard aux dommages qui pourraient être justifiés, soit comme l'avait fait le projet de traité du 14 Janvier 1869, à titre spécial de dédommagement accordé à des particuliers.

Plus tard, dans la discussion qui eut lieu au Sénat de Washington, on proposa expressément :

3o. Un mode de satisfaction, d'après lequel la conduite reprochée au gouvernement Anglais serait *reconnue comme contraire au droit* et

4o. *Répartie par une nouvelle affirmation de principes*, destinée à assurer davantage pour l'avenir le respect du droit international et à garantir la pratique de la justice dans le monde civilisé.

Il serait peut-être possible de trouver encore d'autres formes de satisfaction, notamment dans l'hypothèse d'une réconciliation des deux puissances.

Mais, si l'on en vient à trancher la question judiciairement, et spécialement par voie d'arbitrage, la première proposition,—celle qui a pour objet une cession de territoire,—doit, à mon avis, être absolument écartée ; car, si haut que l'on puisse évaluer la faute du gouvernement anglais, elle n'a pourtant absolument aucune espèce de rapport avec une cession de territoire anglais. Aucun juge ne pourrait donc condamner l'Etat de la Grande-Bretagne à détacher de l'empire britannique une portion de son territoire, et à le livrer aux États-Unis. La première proposition n'a conséquemment de sens possible, que si la Grande-Bretagne accepte *volontairement* un pareil mode de réconciliation, sans y être judiciairement contrainte, ou si, à la suite d'une guerre, dans laquelle elle aurait été vaincue par l'Union, celle-ci en faisait une condition de la paix.

La troisième proposition ne présente à la vérité aucune difficulté, *au point de vue juridique*. Au contraire, si une réparation quelconque est due, c'est seulement dans la supposition que le gouvernement Anglais ait méconnu ses devoirs et le droit de l'Union. Celui qui a violé le droit peut et doit l'avouer, ou s'il s'y refuse, il doit souffrir que le juge impartial dénonce publiquement et lui reproche sa faute.

Mais cette proposition présente une difficulté *politique* considérable. Un *aveu formel de culpabilité*, quelque louable qu'il soit aux yeux de la morale et de la justice, est invinciblement ressenti par la nation en faute comme une acte d'indigne faiblesse. Cette raison suffit déjà pour qu'on ne puisse l'exiger du gouvernement d'une grande puissance. Un peuple consentira bien plus volontiers à voir son gouvernement réparer ses torts envers la nation lésée au moyen d'une prestation matérielle quelconque, qu'à se résigner à un solennel : *Pater peccavi*. La renonciation à cette troisième proposition est donc commandée, non par des motifs de droit, mais par des considérations politiques.

La vraie solution me semble consister dans la combinaison de la seconde avec la quatrième proposition.

La seconde ne suffit point à elle seule, car elle tend à réduire une grande question nationale aux infimes proportions d'une question pécuniaire. Les intérêts privés figurent trop au premier plan, alors surtout que la nature du dommage réel porte à faire mesurer la réparation en argent, tandis que l'intérêt du droit public et international se trouve au contraire relégué dans l'ombre. C'est là le défaut principal du traité du 14 Janvier 1869.



Mais la quatrième proposition prise isolément n'est pas davantage satisfaisante. Sans doute elle répond au point principal, en ce sens que la dignité de deux grandes puissances ne sera suffisamment souvegardée, que lorsqu'elles chercheront et trouveront les bases de leurs arrangements et de leur réconciliation dans un accord favorable à l'avenir des deux nations, et de nature à consolider, à augmenter la paix et la prospérité du monde civilisé. Mais se borner à ce côté *idéal* de la question, relatif à l'avenir, c'est faire trop bon marché des dommages réels causés dans le passé. La proclamation même des règles idéales semble faible et incertaine, aussi longtemps qu'elle ne se traduit point en faits positifs et matériels.

La *combinaison* des deux propositions a au contraire l'avantage de remédier, du moins en partie, aux suites de la faute commise, et de fortifier pour l'avenir la foi au droit et à sa puissance. Elle constitue une réparation des torts passés, et une garantie de sécurité pour le droit de l'avenir.

Si donc les deux puissances adverses faisaient, soit avec, soit sans l'aide d'un tribunal arbitral, un arrangement d'après lequel :

1. Elles reconnaîtraient expressément, quoiqu'en termes conciliants, l'obligation incombant à tout État ami et neutre, d'empêcher que l'on n'abuse de son territoire pour faire la guerre à un autre État, et
2. La Grande-Bretagne, en considération de ce qu'elle n'a pas suffisamment observé la neutralité, se déclarerait prête à payer à l'Union et entre les mains des propriétaires lésés, une juste indemnité ;

un pareil arrangement ne constituerait pas seulement l'heureuse solution d'une grave difficulté, mais contribuerait de la manière la plus utile à l'affermissement et au progrès du droit des gens, ainsi qu'au développement des relations commerciales maritimes.

#### 9.—CONCLUSION.

Résumons en quelques propositions les résultats de cette étude :

I. La reconnaissance des États du Sud comme puissance belligérante et la déclaration de neutralité de la part de la Grande-Bretagne et de la France, n'ont point constitué une violation du droit international. En se décidant à agir ainsi, les États Européens n'ont fait qu'exercer un droit, quelles que fussent du reste

les raisons sérieuses que l'on pût objecter contre l'opportunité politique de cet exercice.

Les États-Unis ne sont donc pas autorisés, quelque funestes qu'aient été pour eux les résultats de cette reconnaissance, à exiger que la Grande-Bretagne ou la France leur en accorde satisfaction ou réparation, ce qui ne pourrait avoir lieu que si le droit avait été méconnu.

II. En supposant que les faits reprochés au gouvernement Anglais, relativement à l'armement de l'Alabama et à sa libre sortie d'un port Anglais, soient matériellement vrais, nous sommes en présence d'une inobservation fautive des devoirs d'un État neutre et ami vis-à-vis de l'Union, et celle-ci a droit de ce chef à demander satisfaction et réparation à la Grande-Bretagne.

III. Les propriétaires des vaisseaux Américains et des marchandises Américaines détruites, n'ont aucune action privée en dommages-intérêts contre le gouvernement Britannique ; mais le gouvernement de l'Union peut surveiller et protéger leurs intérêts dans le règlement de la difficulté pendante avec le Grand-Bretagne.

IV. La véritable solution du différend consiste dans la combinaison d'une réparation matérielle destinée à indemniser les propriétaires Américains, avec une garantie morale des relations commerciales et maritimes contre le retour de semblables dommages. Le premier de ces buts sera atteint au moyen d'une juste indemnité pécuniaire, que la Grande-Bretagne paiera à l'Union pour être partagée entre les personnes lésées ; le second le sera par une nouvelle proclamation du devoir incombant aux États neutres et amis, d'empêcher autant que possible qu'on n'abuse de leurs territoires neutres pour y organiser des expéditions militaires.

#### APPENDICE A L'ARTICLE QUI PRÉCÈDE.—

#### LETTRE DE M. LIEBER SUR L'ARBITRAGE INTERNATIONAL.

Nous croyons être utiles aux lecteurs de la Revue, en publiant ici, comme suite au travail de M. Bluntschli, la traduction d'une lettre écrite par M. F. LIEBER, de New York, au sujet de la juridiction à laquelle il conviendrait de déférer la décision du différend Anglo Américain. En effet, bien que cette lettre date déjà de quelques années et que l'opinion émise en cette circonstance par notre éminent collaborateur ait été souvent invoquée depuis, les développements qu'il lui a donnés sont, pensons-nous,

peu connus, le texte original du document n'ayant été publié que par le *New York Times* du 22 Septembre, 1865. Aussi a-t-il fallu toute l'obligeance de l'auteur pour nous en procurer une copie.

L'article de M. Bluntschli, qui s'occupe du fond de la question et la lettre de M. Lieber, qui indique le tribunal appelé à en connaître, forment pour ainsi dire dans leur ensemble une consultation complète, émanée de deux illustrations de la science, sur une affaire destinée à demeurer célèbre dans les annales du droit des gens. Et le lecteur se souviendra avec plaisir, en lisant ces pages, que leurs deux signataires, rapprochés par un amour commun de la paix et de la justice, ne le sont pas moins par une amitié qui défie le temps et la distance.

Ajoutons ce fait intéressant sur lequel nous aurons l'occasion de revenir dans notre prochaine *Chronique du droit international*. C'est que M. F. Lieber vient d'accepter les fonctions d'*arbitre*, chargé de statuer en dernier ressort, entre les États-Unis et le Mexique, sur les réclamations réciproques que les deux Républiques sont convenues de régler, par compromis du 4 Juillet, 1868.

*Lettre de FRANCIS LIEBER à l'honorable WILLIAM SEWARD,  
Secrétaire d'État.*

CHER MONSIEUR,

Permettez-moi de vous adresser, sous forme de lettre, quelques observations sur un sujet qui mérite l'attention de tout citoyen Américain et de tout partisan du droit et du progrès. Vous, Monsieur, qui êtes à la tête de nos affaires étrangères, et dont l'influence se fait sentir, pour une si grande part, dans la direction de nos affaires intérieures et extérieures les plus importantes, vous me pardonnerez, j'en ai la respectueuse confiance, de vous désigner publiquement comme le destinataire de cette lettre, puisque je dois y parler d'arbitrage international.

Les États-Unis élèvent de sérieuses réclamations à charge de la Grande-Bretagne, à raison des dommages que leur ont infligés les corsaires armés contre eux dans les ports Anglais, en violation des lois de la neutralité. D'un autre côté, il nous revient que la Grande-Bretagne formule des contre-réclamations à charge des États-Unis. C'est là, sous tous les rapports, une grave question. Quels sont les moyens d'apaiser ces griefs mutuels ?

Les différends internationaux d'un caractère sérieux ne peuvent prendre fin que par un des quatre moyens suivants :

La discussion peut être prolongée assez longtemps pour que le cours des événements fasse surgir des questions plus importantes, et que l'on arrive à écarter définitivement la contestation originaire, en omettant de la mentionner dans un nouveau traité que l'on conclurait. Le cas s'est présenté en effet, mais il n'est guère probable que de tels arrangements, pour ainsi dire *par défaut*, se reproduisent encore dans nos temps modernes, alors que les parties contendantes sont de grandes et puissantes nations, et que l'objet de la contestation a des proportions également importantes.

Il se peut aussi que les gouvernements intéressés aplanissent leurs dissentiments par voie diplomatique, et scellent par un traité spécial l'arrangement intervenu. Il n'est pas à prévoir que l'Amérique et l'Angleterre arrivent à régler leurs différends par ce moyen, du moins dans un délai raisonnablement court. Cependant toute prolongation de difficultés internationales, surtout entre grandes nations, destinées aux rapports les plus intimes, est à la fois nuisible et dangereuse. Elle contrarie cet esprit pacifique, à défaut duquel une paix purement extérieure, ne consistant que dans l'absence de la guerre, constitue tout au plus un temps d'arrêt, dépouillé en grande partie des plus sérieux avantages de la paix. Tel est spécialement le cas pour toutes les nations qui reconnaissent pour la première et peut-être pour la suprême loi du développement de la civilisation moderne, le commandement fait à la famille des peuples de croître et de se multiplier, tout en demeurant unie par un droit commun. En tout cas, la présente lettre est écrite dans la supposition que le différend anglo-américain actuel ne sera point tranché par voie de transactions diplomatiques, ou qu'il ne pourra pas être résolu de cette manière dans une période de temps raisonnable.

Le troisième moyen de mettre fin aux conflits internationaux, c'est la guerre, moyen certain d'arrêter momentanément une discussion, mais dont il serait absurde, pour l'une ou l'autre des deux parties, d'attendre la réparation des dommages reçus. Tout ce qui en résulterait, ce seraient de nouveaux griefs, et la nécessité de supporter des frais plus considérables que ne le seraient toutes les indemnités réclamées avant la guerre. Ni les Anglais, ni nous-mêmes, ne songerions à nous indemniser par voie de conquête, ce qui serait d'ailleurs, à ne considérer que le côté pécuniaire de la question, un pauvre moyen de nous payer. Les sommes énormes levées par Napoléon, sous forme de "contributions" dans les pays conquis, ne réduisirent point le fardeau des impôts que

la guerre fit p  ser sur la France. Aller en guerre contre l'Angleterre pour la forcer    payer les sommes que nous lui r  clamons, serait aussi insens   que d'essayer de tuer une mouche pos  e sur de la porcelaine de S  vres, en lan  ant une pierre    l'insecte, pour l'emp  cher de souiller le vase pr  cieux.

Il ne reste donc que l'arbitrage comme quatri  me proc  d   pour mettre fin aux diff  rends internationaux. L'arbitrage international, auquel recoururent librement de puissants gouvernements, dans la conscience de leur compl  te ind  pendance et de leur souverain   propre, est un des traits qui caract  risent le mieux les progr  s de la civilisation,—le triomphe de la raison, de la loyaut   et de la soumission    la justice, sur les bravades de la force et les fureurs de la vengeance. Cette institution appartient aux temps modernes, ou plut  t    l'  poque actuelle ; cependant si elle porte la noble empreinte de l'  poque la plus r  cente, elle conserve aussi l'impur alliage de p  riodes plus grossi  res et demande      tre am  lior  e et d  velopp  e. C'est ce que r  clame le droit international.

On peut dire que toute administration de la justice a son origine dans l'arbitrage, et que toute l  gislation, en se d  veloppant, retourne en grande partie aux tribunaux arbitraux, auxquels les Fran  ais et les Allemands ont donn   le nom si juste et si beau de tribunaux de paix. Le droit civil des Romains connaissait l'arbitrage. Les tribunaux arbitraux, compos  s de juges   lus, autres que les juges de profession, devant lesquels les parties comparaissent volontairement, sans assistance de conseils, pour obtenir des sentences   quitables,—ces tribunaux se sont r  pandus en Prusse, dans le Danemark et dans d'autres pays, o   ils terminent annuellement un nombre consid  rable de proc  s.

Les anciens Grecs, avec leurs nombreuses cit  s et conf  d  rations, unies par une communaut   de langage, de religion et de civilisation, connaissaient l'arbitrage, sinon *entre nations*, du moins *entre   tats*,—commissions temporaires d  sign  es par les cit  s en litige, et au jugement desquelles ces derni  res juraient de se soumettre. Car il est    peine n  cessaire de constater que le trait caract  ristique de ces arbitrages, c'est la soumission volontaire des parties    un juge librement   lu, avec leur promesse formelle et solennelle d'accepter loyalement sa sentence.

Mais cet arbitrage international, qui consiste dans le choix d'une puissance souveraine par deux puissances contendantes   galement souveraines ou par des gouvernements, agissant au nom

de nations entières, avec mission de rendre un jugement, auquel se soumettront loyalement deux puissants souverains,—ce genre d'arbitrage appartient aux temps les plus récents, et est considéré par ceux qui étudient le droit international et l'histoire de la civilisation comme un des indices les plus encourageants du véritable progrès.

Observons toutefois que, jusqu'à ce jour, les monarques ont été presque exclusivement choisis comme arbitres, ce qui offre plus d'un inconvénient. Il peut arriver que les parties ne réussissent point à s'entendre sur le choix d'un monarque ou d'un gouvernement, qui leur agréé à toutes deux. Le différend anglo-américain actuel semble en offrir un exemple. L'Amérique ne porterait probablement son choix que sur l'Empereur de Russie, en admettant qu'elle voulût soumettre le cas à un gouvernement européen, et qu'elle fût convaincue que les fonctionnaires de ce gouvernement, essentiellement militaire, sont également versés dans le droit international et dans le droit maritime. Mais d'un autre côté la Russie, selon toute probabilité, ne conviendrait point à la Grande-Bretagne.

Un autre grand inconvénient qui s'offre dans le choix d'un monarque comme arbitre, est le fait que le seul personnage publiquement connu comme juge est précisément le seul qui, dans le cours ordinaire des choses, ne s'occupe pas lui-même de la question en litige, qui ne peut le faire, et de qui personne n'attend qu'il le fasse.

Lorsqu'une difficulté internationale est déférée à un monarque, ou même au suprême représentant d'une république, c'est-à-dire aujourd'hui au chef du *pouvoir exécutif*, quelle est la marche suivie ? L'affaire est renvoyée au ministre de la justice, ou à quelque haut fonctionnaire du même ordre ; celui-ci charge un conseiller ou un autre employé, parfois une commission, de lui présenter un rapport qu'il soumet à l'arbitre nominal. Ceux qui réellement décident demeurent inconnus, ou du moins ils n'assument ni ne sentent aucune responsabilité publique et finale. Dans bien des cas de cette espèce il y a un grave danger et une sérieuse inconséquence à soumettre les plus hautes questions de droit et d'équité à un pouvoir exécutif, et non à une autorité renommée pour sa science juridique et directement responsable. Combien plus aisé serait l'acquiescement à la sentence, combien plus digne de communautés civilisées, combien plus respectable sous tous les rapports serait un tribunal choisi parmi des jurisconsultes, à qui

leurs vastes connaissances et leur fidélité inébranlable à la justice et à la vérité juridique auraient valu une réputation universelle. On ne trouverait sans doute ni Anglais ni Américain bien intentionné qui ne préférât de beaucoup soumettre tout l'ensemble des questions en litige à un Hugo Grotius, plutôt qu'au chef de n'importe quel empire actuellement existant. On pourra, il est vrai, répondre que l'on n'a pas toujours un Hugo Grotius sous la main ; d'ailleurs même des individus en possession d'une réputation sans tache, et résolus à prononcer comme ils le croiront juste, pourront ne pas encore paraître, dans tous les pays, à l'abri de toute pression gouvernementale. Il serait difficile, dans l'état présent de notre civilisation, d'obtenir que deux nations contendantes s'accordassent sur le choix d'une seule personne, autre qu'un monarque, et attribussent à un jurisconsulte vivant l'autorité que le congrès de Vienne reconnaissait entre autres à Grotius, librement cité dans le grand conseil international. D'autre part il ne serait pas aisé de persuader à un particulier de remplir l'office d'arbitre, en supposant même que les parties convinssent de la prendre pour juge international. Mais celles-ci ne pourraient-elles, si toutes deux étaient sincèrement disposées à n'obtenir que ce qui leur est dû en droit strict, s'entendre pour soumettre leur différend à la Faculté de droit de quelque Université étrangère ? Les membres d'une telle Faculté sont ordinairement des personnes qui se sont déjà fait un nom dans la science et la littérature du droit, et qui espèrent que ce nom passera à la postérité. Ils comprennent tout le poids et l'importance d'une grave décision rendue dans les plus hautes sphères du droit, et ils auraient la conscience que leur jugement, dans une affaire internationale, une fois approuvé et consacré par l'élite de leur race, ferait désormais partie intégrante de cette loi qui prévaut entre nations indépendantes, que sanctionnent l'équité et la raison, et qui s'étend graduellement, même jusqu'au-delà des limites de la race qui l'a heureusement créée. En effet, au moment où j'écris cette lettre, ce ne sont pas non-seulement les Turcs, l'Égypte et la Perse qui ont adhéré à quelques unes des principales règles de notre droit international. Une traduction chinoise du *Droit international* de WHEATON vient encore d'arriver dans ce pays, et se trouve maintenant dans la bibliothèque de votre département.

Dans le conflit actuel on peut tenir pour certain qu'aucune des deux parties n'a le désir ni l'espoir de circonvenir l'autre. Les nations Américaine et Anglaise sont trop grandes pour descendre

à des ruses diplomatiques; et quand même la loyauté et l'équité internationales ne s'opposeraient pas déjà à de tels procédés ou à des tentatives de cette nature, la prudence et l'intérêt seuls commanderaient d'y renoncer. Les Américains et les Anglais sont à la fois trop clairvoyants et trop obstinés, ils sont trop au même niveau d'intelligence et de civilisation, ils s'accordent trop dans leur manière de concevoir la justice, le droit et la loyauté, pour placer grand espoir dans la finesse diplomatique ou dans d'habiles artifices. Mais s'ils désirent réellement mettre fin à leurs différends conformément aux principes du droit, trouvera-t-on de ce côté ou du côté oriental de l'Atlantique un seul homme de langue anglaise qui douterait qu'une Faculté de droit comme celle de l'Université de Berlin, avec son éminent jurisconsulte international Haffter; ou,—si la Prusse était répudiée comme puissance trop importante—que la Faculté de droit de Heidelberg ou celle de Leyde ne fût beaucoup plus compétente pour trancher nos différends qu'un Empereur ou une République quelconque. Une république ne saurait décider comme république, elle devrait s'en remettre à quelque commission. Une Faculté de droit, spécialement celle d'une Université célèbre dans un Etat de second ordre, semble constituer un tribunal plus convenable que tout autre collège imaginable pour le jugement d'un grand nombre, peut-être du plus grand nombre des grandes questions internationales. Il semble qu'elle soit naturellement appelée à ces hautes fonctions. Aussi la désignation d'une Faculté de droit comme tribunal d'arbitrage international serait-elle une mesure digne d'être inaugurée par les deux grandes puissances les plus libres, dont les gouvernements méritent d'être comptés, dans la diplomatie, parmi les plus raisonnables et les plus sincères.

Que les Etats-Unis et la Grande-Bretagne s'accordent sur le choix de l'Université; qu'ils demandent au gouvernement du pays auquel celle-ci appartient, la permission, qui certainement serait accordée, de consulter la Faculté de droit;—que les deux puissances fixent les honoraires qui seront payés à cette faculté et qui seront pour moitié à charge de chacune d'elles, à l'exclusion de tous autres présents ou distinctions immédiates ou en perspective; que chaque partie nomme ses commissaires en tel nombre qu'elle le désire, et personne ne pourra douter qu'il n'intervienne une sentence conforme à la justice.

Le paiement d'une indemnité, qui semble au premier abord hors de saison dans une question internationale, n'en est pas moins



pris ici en considération, par le motif que l'affaire à décider absorberait une portion considérable du temps des juges, et aussi afin d'écarter jusqu'à la moindre parcelle de tout cet arsenal de séduction qui consiste en morceau de rubans et en décorations, en tabatières et en titres, en dons d'argent ou de terres, faits immédiatement ou tenus en perspective. Non que de tels juges fussent capables de se laisser influencer par des moyens de ce genre. Le tribunal, dont les clients seraient des nations, aurait sans doute conscience qu'à son tour il aurait à comparaître devant un tribunal plus élevé—celui de l'histoire, mais il convient d'éviter jusqu'à une tentative apparente ou jusqu'au vague soupçon d'une tentative, ayant pour but de faire descendre un tribunal aussi considérable au niveau de la diplomatie ordinaire.

Les grandes Universités ont été consultées dans les temps passés, bien que ce fût généralement en matière théologique. Dans différents pays, tels que la France et l'Allemagne, elles ont même été consultées et elles le sont encore, du moins dans ce dernier pays, en matière civile et pénale. Pourquoi, en matière internationale, ne pas recourir à ces institutions, qui elles-mêmes portent l'empreinte de notre civilisation ? L'adoption du système proposé constituerait, pour notre race, un progrès signalé. Il n'y a pas de spectacle plus noble que celui du fort—nation ou individu—déposant sa force, comme une épée, à ses pieds, et disant : " Nous nous conformerons au jugement du sage. Que justice soit faite ! "

Ce n'est pas le charme de la nouveauté qui m'entraîne vers cette idée. J'avais déjà communiqué un projet semblable à un homme d'État éminent, membre du congrès, dès l'époque de la question de l'Orégon, et mon opinion tenait complètement arrêtée sur ce point au moment où la décision du roi Guillaume des Pays-Bas, concernant la frontière nord-est, fut connue dans ce pays. Les circonstances ne provoquèrent pas à cette époque de plus amples développements. Mais aujourd'hui je crois pouvoir me hasarder, Monsieur, à vous exposer mon système d'une manière plus précise et j'espère, en m'abritant sous l'autorité de votre nom, attirer sur ce point l'attention publique.

Les deux nations, qui semblent le plus spécialement destinées à répandre la civilisation sur toute la surface du globe, accepteront-elles ce mode de trancher leurs différends actuels ? Qu'elles s'y décident ou non, ce qui ne fait pas doute en mon esprit, c'est que la race cis-caucasienne arrivera, dans un avenir prochain, à la

pratique des tribunaux arbitraux de ce genre, beaucoup mieux qualifiés que ne peut l'être un arbitre couronné.

J'ai l'honneur, Monsieur, de me nommer, avec le plus profond respect, votre obéissant serviteur,

FRANCIS LIEBER.

Washington, 17 sept. 1865.

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### THE FISHERY QUESTION.

Previous to the American Revolution, the inhabitants of the British Colonies in North America exercised the right of fishing in all the bays, harbours, creeks and rivers of the present Provinces of Quebec, Ontario, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland.

The treaty of 1783, by which the independence of the United States was recognized, provided, amongst other things, that American subjects should have the right of fishing on the Banks of Newfoundland, along such coasts of the same Island as were used by British seamen, in the Gulf of St. Lawrence, and on the coasts, bays, and creeks of all other British dominions in North America; as well as the right of drying and curing fish in any of the unsettled bays, harbours, and creeks of Nova Scotia, the Magdalen Islands and Labrador, so long as they should continue unsettled; but not the right of drying and curing on the Island of Newfoundland. <sup>(1)</sup>

After the War of 1812, the treaty of Ghent containing no provisions respecting the fisheries, the British Government contended that the treaty of 1783, by which alone the right of inshore fishing on the coasts of the British North American Provinces had been granted, had by the war of 1812 been absolutely annulled, and that consequently such right of inshore fishing no longer existed. On the part of the United States Government, it was pretended that the rights granted by that treaty were in their nature perpetual, and consequently were not affected by the breaking out of the war.

In 1818 a compromise was effected by convention, and it was thereby agreed between the contracting parties "that the inhabi-

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(1) Vide Appendix No. 1.

tants of the said United States shall have, forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands on the Western and Northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands; on the shores of the Magdalen Islands; and also on the coasts, bays, harbours, and creeks from Mount Joly on the southern coast of Labrador to and through the Straits of Belleisle, and thence northwardly indefinitely along the coast; without prejudice, however, to any of the exclusive rights of the Hudson Bay Company: and that the American fishermen shall also have liberty, forever, to dry and cure fish in any of the unsettled bays, harbours, and creeks of the southern part of the coast of Newfoundland here above described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry or cure fish on or within three marine miles of any of the coasts, bays, creeks or harbours of His Britannic Majesty's dominions in America, not included within the above mentioned limits. Provided, however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatsoever. But they shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them." (2)

Discussions as to the interpretation of the Convention were entered into as early as 1823, between the British and American Governments, the former claiming in favour of its subjects the exclusive right of fishing not only in the bays on the coasts of Nova Scotia and New Brunswick, and that portion of Canada to the south of the River and Gulf of St. Lawrence, and to the westward of Mount Joly on the north, but also within three miles of lines drawn from headland to headland of all such bays, in-

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(2) Appendix No. 2.

cluding specially those of Chaleur and Fundy. The latter Government insisting that in those bays its fishermen had a right to fish at any distance over three miles from the land. Fortunately the Reciprocity Treaty, concluded in 1854, adjusted the difficulties which had arisen between the two Governments on the Fishery question. By its first article it was agreed, "that in addition to the liberty secured to the United States fishermen by the above named convention of 1818, of taking, curing and drying fish on certain coasts of British North American Colonies, therein defined, the inhabitants of the United States shall have in common with the subjects of Her Britannic Majesty, the liberty to take fish of every kind, except shell fish, on the sea coasts and shores of those Colonies, and in the bays, harbours, and creeks of Canada, New Brunswick, Nova Scotia, Prince Edward Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the coasts and shores of these Colonies, and the islands thereof, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish. . . ."

It was further provided by one of its articles, that the treaty should remain in force ten years from the date of its coming into operation, and further, until the expiration of twelve months after either of the high contracting parties should give notice to the other of its wish to terminate the same. <sup>(3)</sup>

The notice so required was given by the United States Government, and the Reciprocity Treaty terminated on the 17th March, 1866.

So many different opinions have been expressed as to the rights of American subjects to fish within three miles of the coasts of the British North American Colonies, that it becomes necessary in the first instance to inquire whether those rights are given by treaty, or whether they spring from the principles of International Law alone.

The dominion over certain portions of the open sea has at different periods been claimed by several of the nations of the world. Spain, Portugal, Holland, and England have in turn, since the discovery of America, endeavoured to arrogate to themselves sovereign power over portions of the sea, but nowadays it seems to be almost universally admitted that the

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(3) Appendix No. 3.

maritime territory of a State extends solely to the distance of three marine miles seawards from its coasts.<sup>(4)</sup> Some difficulty, however, still exists on the subject, owing to the different modes by which States establish the line of their sea coasts. It is admitted by all that the actual line of the shore, with its indentations, bays, and promontories, cannot be followed without producing the greatest confusion and doubt as to the limits of the maritime territory of each State, and consequently straight lines running from headland to headland of bays, not exceeding six miles in width, are taken as the actual line of coast, from which the three marine miles of marine territory of the State to which the headlands belong are to be measured.<sup>(5)</sup> If a bay exceed six miles at its entrance, with islets belonging to the State that owns the shore of the bay, either outside or inside, at a distance of six marine miles or less from the headlands and from each other, the bay is the property of the State to which the headlands and the islets belong, and the boundary landwards of its maritime territory, is the line drawn from headland to headland, resting on the different islets, which give the greatest distance seawards, within six miles of each other, or of one of the headlands, the said line lying perfectly straight between each pair of its resting places, and being also straight between each headland and its nearest resting place.<sup>(6)</sup> Thus an island or islet lying off the coast of a State at a distance of six miles or less, is considered as part of the land territory of that State, and if another island lies at a distance of six miles or less from the first, seawards, or in the entrance of a large bay, such second island also forms part of the land territory of that State, and such is the rule, no matter what may be the number of links in the chain of islands, so long as each island lies within six miles of the coast, or of the neighbouring islands in the chain.

The exclusive right of fishing within maritime territory belongs to the State. No person has any right, according to the prin-

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(4) 1. *Hautefeuille* tit. 1, c. 3, § 1, p. 92. *Lawrence's Wheaton*, pt. 2, c. 4, § 6. *Martens Precis* b. 4, c. 4, § 4 and 10, (three leagues according to him.) *Heffter* § 75. 1 *Twiss* § 172. 1 *Azuni* pt. 1, c. 2, § 15. *Klüber* § 129. *Vattel* § 289. 1 *Phil.* § 19.

(5) 1 *Hautefeuille* *supra*. 1 *Ortolan* 158. 1 *Azuni* Part 1, c. 2, § 17. *Lawrence's Wheaton* *supra*. *Vattel* § 291. 1 *Phillimore* § 199. *Abdy's Kent*, p. 116.

(6) *The Anna*, 5 *Rob.* 385. 1 *Ortolan* p. 145.

ciples of International Law, to fish within the maritime territory of any country or State, but that of which he is a subject.<sup>(7)</sup> Such right to fish within three miles then of the coast of one State by the subjects of another, must be founded upon the provisions of some treaty between such States in force at the time of such fishing. Consequently it must be regarded as clear law, that American subjects have no right to fish within the maritime territory of the British North American Colonies, other than that conferred upon them either by the Treaty of 1783 or the Convention of 1818.

It becomes necessary, owing to the peculiar ideas entertained in the United States upon this question, to consider, in the first place, whether that portion of the Treaty of 1783 having reference to the fisheries, was put an end to by the breaking out of the War of 1812 between Great Britain and the United States.

In the month of April, 1866, Mr. Raymond, in the United States House of Representatives, introduced a report and resolution relative to a proposition made some days previously to send armed vessels to the fishing grounds, adjacent to the British Provinces, for the protection of American fishermen. In the course of his remarks he made use of the following expressions: "It will become a question under what treaty we are now to enjoy the right of fishing on these coasts. The British claim, that by the Treaty of 1814, the preceding Treaty of 1783 was annulled. I do not think that claim can be maintained, but if it should be maintained, it seems to be equally clear that the Treaty of 1818 must have been annulled by the Treaty of 1854. We are, therefore thrown back either upon the original admission of 1783, or if that was annulled by the Treaty of 1814, then we are thrown back upon the rights which we enjoyed previous to that time."

It is hardly possible to suppose that any man occupying the position of a member of the Committee on Foreign affairs of the United States House of Representatives, could make such a public exhibition of his ignorance of the elements of International Law as is apparent to every one in the foregoing extract from Mr. Raymond's speech. The first blunder apparent is, that he wishes to fasten upon the British Government the reproach of pretending

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(7) 1 Ortolan p. 161. 1 Cussy b. 1, t. 2, § 52, p. 129. 1 Rayneval Institutions b. 2, c. x. § 12. 1 Cauchy. p. 39. 1 Phillimore § 188. Lawrence's Wheaton pt. 2, c. 4 § 8. Petrushevecz, art. 6.

that the Treaty of 1783 was annulled by that of 1814. Such an untenable pretension was never in fact advanced by that Government, for the Law Officers of the Crown always enunciated the opinion, that the Treaty of 1783 had been annulled by the breaking out of the War of 1812, and that opinion was based upon a recognized principle of International Law, viz., that all treaties (save and except, perhaps, those made to govern their conduct during war, or expressly made perpetual), concluded between two States, expire on the breaking out of hostilities between them.<sup>(8)</sup>

This principle, as applicable to the Treaty of 1783, is expressly recognized by a recent American authority.<sup>(9)</sup>

Mr. Raymond then proceeds to argue, that if the Treaty of 1814 had the effect of annulling that of 1783, the Convention of 1818 was annulled by the Treaty of 1854. The error committed by him in the first instance of confounding the effect of the War of 1812 with that of the Treaty of 1814, here leads him into the greater absurdity of stating that the Treaty of 1854, by which Great Britain conferred on American subjects great privileges in addition to those enjoyed by them under the provisions of the Convention of 1818, had the effect of annulling that Convention, and then he caps the climax by saying that by the expiration of the Treaty of 1854, the Americans are thrown back upon that of 1783, if not annulled by that of 1818, and if annulled, upon the rights they enjoyed previous to 1783. Now it must be remarked that in the Reciprocity Treaty great care was taken not to interfere with the provisions of the Convention of 1818, so far as the rights of the Americans were concerned, the only portion of the Convention which was temporarily suspended, was that in which they renounced forever the right of inshore fishing off certain portions of the coast of British North American Colonies. The Convention itself was in its nature perpetual. It set at rest, for ever, the rights of the two contracting States. The Reciprocity Treaty merely gave the Americans during its continuance the privilege of fishing where, by the Convention of 1818, they had expressly forever renounced the right to fish. Such privilege or permission was based upon such provision in the treaty; it lasted so long as that treaty lasted, and no longer; and when the treaty

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(8) Heffter § 99. L's Wheaton, pt. 3, c. 2, § 9. Abdy's Kent, p. 420, 3 Phil. § 532 to 538.

(9) Woolsey § 55.

expired, the privilege became extinct, and the rights of the parties are those admitted and granted by the Convention of 1818. It is unnecessary to enter into the question of the rights of the Americans to fish within the limits of the maritime territory of the British American Provinces previous to the American Revolution, for up to that time the rights they so enjoyed were based solely on the fact of their being British subjects. Having, by their successful rebellion, thrown off allegiance to the British Crown, they lost the character of British subjects, and consequently the basis of their fishing rights having been destroyed by themselves, their previous right of fishing in the maritime territory of the British dominions terminated.<sup>(10)</sup> Moreover, as already mentioned, the Convention of 1818 was in its nature a settlement of the conflicting claims of the Governments of Great Britain and the United States.

The Convention of 1818, therefore, must be taken as the deed of compromise, by which alone the rights and privileges of American subjects to fish within the maritime territory of the British North American Provinces are to be measured and ascertained.

Under that Convention, American fishermen have no right to fish within three marine miles of any of the coasts, bays, creeks, or harbours of Canada, on the whole of the south shore of the River and Gulf of St. Lawrence, nor further to the west, on the north shore, than Mount Joly, the exclusive rights of the Hudson's Bay Company to the eastward and northward of that point being reserved. They have the right to fish on the shores of the Magdalen Islands, and also to dry and cure their fish on the now unsettled portion of the coast of Labrador, and by agreement with the inhabitants, proprietors, or possessors of the ground, on any settled part of that coast. They have, moreover, the right of entering all bays and harbours of the Provinces for the purpose of shelter, of repairing damages therein, of purchasing wood, and of obtaining water.

With respect to Nova Scotia, New Brunswick, and Prince Edward Island, American fishermen have no right to fish within three marine miles of any of the coasts, bays, harbours, or creeks of those Provinces, nor have they a right to dry or cure fish on any portion or portions of their coasts.

They have no right to fish within three marine miles of the

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(10) Phil. § 395-6.



coast of Newfoundland, save from Cape Ray to the Rameau Islands on the southern, and from Cape Ray to the Quirpon Islands on the western and northern coast, and they have the same rights and privileges of drying and curing fish on the southern coast of the island, between Cape Ray and the Rameau Islands, as they have on the coast of Labrador to the east of Mount Joly.

But though the intention of the governments contracting was to avoid the possibility of any difficulty arising on the subject of the rights of citizens of the United States to carry on fishing operations within the maritime territory of the British Provinces, yet barely five years had elapsed from the making of the Convention of 1818, when discussions took place as to the meaning of the word bays, therein made use of. The Americans contended that the signification attached to the word by the greater number of the States of the civilized world, should be accepted as defining the bays included in the renunciatory clause; whilst, on the other hand, the British insisted that having from time immemorial claimed and possessed sovereign power over all bays on the coasts of the dominions of the Crown in all parts of the world, and the Government of the United States having also claimed and exercised such sovereign power over all the bays on the coasts of the United States, the extended meaning attached generally by the two governments to the word "bay" should be held to be the one intended in the Convention to apply to that word when used therein.

As already mentioned, the principle of International Law relied upon by the American Government, as to the measurement of the maritime territory seawards of a State, is pretty generally recognized, and if it be not clearly shown that both Great Britain and the United States have refused to admit that principle, and have in fact recognized another by which bays of a greater width than six miles from headland to headland are looked upon as included within the line of coast from which the maritime territory of the State to which the headlands belong is to be measured seawards, but little difficulty should be experienced in deciding against the pretensions of Great Britain. If, on the other hand, the United States, and Great Britain, up to the date of the Convention of 1818, had attached such wider meaning to the word "bay," the American claim must be pronounced unfounded.

A treaty, or convention between States, is but a contract subject to the rules of interpretation applicable to contracts between

individuals. Custom in many instances exercises a controlling influence over a contract, changing the meaning of a word from one which it bears almost universally to another which is entirely different, and its influence is allowed when it can be said that both parties must have used the words in the sense attached to them by custom, and that each party had good reason to believe that the other party so understood them. <sup>(11)</sup>

Great Britain, immemorially, has claimed and exercised exclusive property and jurisdiction over the bays or portions of sea cut off by lines drawn from one promontory to another and called the King's Chambers. <sup>(12)</sup> A similar property and jurisdiction is and has been claimed by the United States over the Delaware Bay, and other bays and estuaries forming portions of their territory. <sup>(13)</sup> Chancellor Kent in his commentaries says: "It is difficult to draw any precise or determinate conclusion amidst the variety of opinions as to the distance to which a State may lawfully extend its exclusive dominion over the sea adjoining its territories, and beyond those portions of the sea which are embraced by harbours, gulfs, bays and estuaries, and over which its jurisdiction *unquestionably* extends. . . . The executive authority of this country, in 1793, considered the whole of Delaware Bay to be within our territorial jurisdiction; and it rested its claim upon those authorities which admit that gulfs, channels and arms of the sea belong to the people with whose lands they are encompassed." In 1806, the United States Government insisted that the extent of neutral immunity, terms equivalent to maritime territory, should correspond with the claims maintained by Great Britain around her own territory, and that no belligerent right should be exercised within "the chambers formed by headlands, or anywhere at sea within the distance of four leagues, or from a right line from one headland to another." <sup>(14)</sup>

It is to be remembered also, that the United States have inherited from Great Britain the principle now maintained in this

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(11) 2 Parsons on Con., pp. 55 and 56. *Gorissen vs. Perrin*, 2, C. B. N. S. 681. Vattel pref. p. lxxv. § 26. 2 Phillimore § 73. Heffter § 94, 95. Petrushevecz art. 68, 69. 2 Phil. § 73.

(12) 1 Phillimore § 199. Heffter § 76. Abdy's Kent p. 114.

(13) L's Wheaton, pt. 2, c. 4, § 7. 1 Attys Gen. Op. p. 33. 1 Kent p. 30.

(14) 1 Kent p. 30.

affair by the latter State. The doctrine of bays, no matter of what size, being subject to the territorial jurisdiction of the State owning the headlands and shores was fully admitted in Great Britain previous to the American Revolution, and as all the other principles of International Law recognized by the mother country at that time were adopted by the Americans after the recognition of their independence, is it not the only deduction that can be drawn from the history of the two nations, their diplomatic correspondence, and the opinions of their jurists, that in the convention of 1818, the word "bay" was used, not in the restricted sense recently applied to it by other States, but as applying to all indentations in the coasts of the British North American Provinces, denominated as, or known under the designation of, bays?

The phraseology employed in the convention must also be carefully considered in order to arrive at the meaning of the contracting parties.

By the first part of the article, the inhabitants of the United States have the right of fishing on the coasts, bays, harbours, and creeks of certain specified portions of British North America, the employment of the words "bays, harbours, and creeks" after the word coasts, must be taken as giving greater rights to the Americans than if they had been limited solely to fishing on the coasts; they were in fact so used in derogation of the usage obtaining amongst both nations to consider the coast, where the evenness of the seashore is broken, to be a line drawn from headland to headland, of bays, harbours and creeks. Without the use therefore of those words in addition to "coasts," the Americans would now have no right to fish in, or on, bays, harbours, and creeks even in the limits specified.

In the second portion of the article by which the United States forever renounce the liberty of taking, drying, or curing fish, on, or within, three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America, not included in the specified limits, the intention was to define so clearly the renunciation that thereafter no difficulty, as to its extent, could possibly arise; thus again the words "bays, creeks, or harbours," are used in addition to the word "coasts," and the United States expressly renounce the liberty of taking, drying and curing fish, not only on, or within three marine miles of "the coasts," but also within three marine miles of "the bays, creeks and harbours" of British North America. But the word coasts

according to the interpretation generally accepted, means, where the evenness of the shore is broken by indentations, a line drawn from headland to headland, when not more than six miles apart, so that the addition of the words "bays, creeks and harbours" add nothing, according to the American interpretation, to the meaning of the word "coasts," but it is perfectly clear that they do mean something more. The word "bays" is used without limitation, it applies to all the bays not included in the specified limits, and as each bay commences from a straight line drawn from one of its headlands to the other, American fishermen have no right to fish within three marine miles of such straight lines, no matter what may be the distance between the headlands of the bay.

The bays, with respect to which difficulties, judging from the past, may be expected to arise, are those of Fundy and Chaleur. The Bay of Fundy may, perhaps, be regarded as open throughout its whole extent to within three miles of lines drawn from headland to headland of bays, not exceeding six miles in width, and resting upon islands, belonging to New Brunswick, as hereinbefore set out, to the fishing operations of American vessels. The umpire to whom had been referred the question of the condemnation of an American fishing vessel, captured whilst fishing in that bay, held, "that the Bay of Fundy was not a British bay, nor a bay within the meaning of the words used in the Treaties of 1783 and 1818."<sup>(15)</sup>

The decision of the umpire in that case was accepted by the Government of Great Britain, and the award of damages paid. Great Britain's right to claim that bay as a portion of the maritime territory of the Province of New Brunswick was, in fact, the question submitted for decision, and the ruling of the umpire in favour of the American pretension has the force of a precedent so far as the Bay of Fundy is concerned. But it is to be remembered that one of the headlands of that Bay belongs to the State of Maine, and the award cannot be held to apply to the Bay of Chaleur, inasmuch as the question submitted had no reference to the proprietorship of the latter bay,<sup>(16)</sup> and as both its headlands belong to British North America.

With the single exception then of the Bay of Fundy, Ameri-

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(15) L's Wheaton, pt. 2, c. 4, § 8, n. 106.

(16) 3 Phil. § 3. Vattel, b. 2, § 329.

can vessels have no right whatsoever to fish within three miles of the line stretching from headland to headland of the bays on the coast of British North America, within the limits hereinbefore set out,—their rights are strictly defined by the Convention of 1818, and must be confined within the limits therein specially mentioned. The general rules of International Law, the provisions of the Treaty of 1783, and the privileges extended to them by that of 1854, cannot be invoked in order to liberate them from the terms of the compromise of 1818, construed and interpreted according to the then established custom and usage of the British and American Governments.

Another question which has been frequently raised in connection with the fisheries, is the right of Great Britain to close the Gut of Canso against American vessels.

The Gut of Canso is "a strait in British North America, dividing Cape Breton from Nova Scotia and forming a secure and much frequented passage from the Atlantic into the Gulf of St. Lawrence; it is about twenty-one miles long and varying from one mile to one mile and a half broad."<sup>(17)</sup>

Taking it for granted that it forms a part of the maritime territory of Canada, still being a means of communication formed by nature between the Atlantic Ocean and the Gulf of St. Lawrence, both, portions of the common property of the nations of the world, it follows as a consequence, that the right of peaceable passage exists in favour of vessels of every nationality. The right being one based on the principles of International Law and exercised independently of Great Britain, that power cannot prevent the passage of United States vessels through that Strait.<sup>(18)</sup>

Writers on International Law are divided in opinion upon the subject, but the greater number espouse the side of the question opposed to the pretensions of Great Britain. Moreover, the general principles of law, and the current of modern opinion as expressed in Treaties, clearly indicate the fallacy of the idea that

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(17) Imperial Gazetteer.

(18) Abdy's Kent, p. 116; Lawrence's Wheaton, pt. 2, c. 4, § 9; 1 Hautefeuille, pp. 97 and 99; 1 Phillimore § 178; 1 Cauchy, p. 42; 1 Cussy, b. 1. tit. 2, § 41; 1 Azuni, pt. 1, c. 3, art. 2 § 1; 1 Ortolan, b. 2, c. 8, p. 146; Vattel, b. 1, c. 23, § 292; Rayneval b. 2, c. 9, § 7; Heffter § 33, 76; Petruschewicz, art. 9.

Contra—1 Twiss, § 174; Klüber, § 130; Martens Précis, pp. 171-168.

the right of peaceable passage does not exist in favour of foreign vessels through the Gut of Canso.

The message of President Grant to the Senate and House of Representatives of the United States, delivered on the 5th December, 1870, contains three distinct charges on the subject of the Fishery Question against the Government of the Dominion of Canada. He therein accuses them in the first place of unfriendliness and want of courtesy towards United States fishermen; in the second, of assuming by statute untenable jurisdiction over United States vessels; and in the third, of allowing their officers to make extravagant and unfounded claims.

The first charge is couched in the following language:

" CANADIAN FISHERIES.

" The course pursued by the Canadian authorities towards the fishermen of the United States during the past season has not been marked by a friendly feeling. By the first article of the Convention of 1818, between Great Britain and the United States, it was agreed that the inhabitants of the United States should have forever, in common with British subjects, the right of taking fish in certain waters therein defined. In the waters not included in the limits named in the Convention, within three miles of the ports of the British coast, it has been the custom for many years to give intending fishermen of the United States a reasonable warning of their violation of the technical rights of Great Britain. The Imperial Government is understood to have delegated the whole or a share of its jurisdiction or control of these in-shore fisheries grounds to the colonial authority known as the Dominion of Canada, and this semi-independent but irresponsible agent has exercised its delegated powers in an unfriendly way. Vessels have been seized without notice or warning, in violation of the custom previously prevailing, and have been taken into the colonial ports, their voyages broken up, and the vessels condemned. There is reason to believe that this unfriendly and vexatious treatment was designed to bear harshly upon the hardy fishermen of the United States, with a view to political effect upon this Government."

The President here sets up a breach of a custom previously prevailing to give warning to intending fishermen of the United States of their violation of the technical rights of Great Britain. What the President meant by his use of the terms "technical rights of Great Britain" is rather difficult to find out, but it may be taken for granted that the word "technical" is used to weaken the meaning of the word "rights" as much as possible.

This charge being based merely on a want of courtesy, hardly needs refutation. It is of so little importance in a legal point of

view, that it may be passed over almost in silence, merely referring to the proclamation issued by the President to United States fishermen, warning them against infringing the conditions of the Convention of 1818, as evidence of the fact that his government had received notice of the intention of that of Canada to proceed against trespassers on Canadian maritime territory. Such notice to a government in cases of blockade being considered equivalent to notice to each of its subjects.<sup>(19)</sup>

The following is the second charge:—

“The statutes of the Dominion of Canada assume a still broader and more untenable jurisdiction over the vessels of the United States, as they authorize officers or persons to bring vessels hovering within three marine miles of any of the coasts, bays, creeks, or harbours of Canada, into port to search their cargo, to examine the master on oath touching the cargo and voyage, to inflict upon him a heavy pecuniary penalty if true answers are not given; and if such a vessel is found preparing to fish within three marine miles of any of such coasts, bays, creeks or harbours without a license, or after the expiration of the period named in the last license granted to it, they provide that the vessel, with her tackle, &c., &c., shall be forfeited. It is not known that any condemnations have been made under this statute. Should the authorities of Canada attempt to enforce it, it will become my duty to take such steps as may be necessary to protect the rights of the citizens of the United States.”

The clauses of the Statutes referred to in the foregoing extract from the President's message, are—

31 *Vic. Cap* 61, § 2.—“Any commissioned officer of Her Majesty's navy, serving on board of any vessel of Her Majesty's navy, cruising and being in the waters of Canada for the purpose of affording protection to Her Majesty's subjects engaged in the fisheries; or any commissioned officer of Her Majesty's navy, fishery officer, or stipendiary magistrate, on board of any vessel belonging to or in the service of the Government of Canada, and employed in the service of protecting the fisheries; or any officer of the Customs of Canada, sheriff, magistrate, or other person duly commissioned for that purpose, may go on board of any ship, vessel, or boat, within any harbour in Canada, or hovering (in British waters) within three marine miles of any of the coasts,

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(19) *Abdy's Kent*, p. 367; *Lawrence's Wheaton*, ed. 1863, pp. 836, 837; appendix No. 4.

bays, creeks, or harbours in Canada, and stay on board so long as she may remain within such place or distance."

33 *Vic. Cap* 15, § 1.—"The third section of the above-cited Act shall be and is hereby repealed, and the following section is enacted in its stead :—

"3. Any one of such officers or persons as are above-mentioned, may bring any ship, vessel, or boat being within any harbour in Canada, or hovering (in British waters) within three marine miles of any of the coasts, bays, creeks, or harbours in Canada, into port, and search her cargo, and may also examine the Master upon oath touching the cargo and voyage; and if the Master, or person in command, shall not truly answer the questions put to him in such examination, he shall forfeit four hundred dollars; and if such ship, vessel, or boat be foreign, or not navigated according to the laws of the United Kingdom, or of Canada, and have been found fishing, or preparing to fish, or to have been fishing (in British waters) within three marine miles of any of the coasts, bays, creeks, or harbours of Canada, not included within the above-mentioned limits, without a license, or after the expiration of the period named in the last license granted to such ship, vessel, or boat, under the first section of this Act, such ship, vessel, or boat, and the tackle, rigging, apparel, furniture, stores, and cargo thereof, shall be forfeited."

The charge made in the Message, then, is simply, that the Parliament of Canada has no right in law to impose upon United States vessels coming into the maritime territory of Canada conditions such as those provided for in the foregoing clauses.

It has already been shewn that the maritime territory of Canada extends seawards to a distance of three marine miles from its coasts, bays, creeks and harbours. (*Ante* p.

The clauses of the Statutes complained of do not assume jurisdiction over the open sea, but are strictly confined in their operation to the maritime territory of Canada.

Wheaton thus defines the rights of a State over its maritime territory: "The general usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon shot will reach from the shore along all the coasts of the State. Within these limits its rights of property and territorial jurisdiction are absolute, and exclude those of every other nation."<sup>(20)</sup>

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(20) Lawrence's Wheaton, pt. 2, c. 4, § 6, p. 320.



Heffter in "Le Droit International Public de l'Europe," at § 75, says—

"Les États maritimes ont le droit incontestable, tant pour la défense de leurs territoires respectifs, contre des attaques imprévues, que pour la protection de leurs intérêts, de commerce et de douanes, d'établir une surveillance active sur les côtes et leurs voisinages, et d'adopter toutes les mesures nécessaires pour fermer l'accès de leurs territoires à ceux qu'ils refusent d'y recevoir, ou qui ne se seront pas conformés aux dispositions des règlements établis. C'est une conséquence naturelle de ce principe général : 'ut quod quisque propter defensionem sui fecerit, jure fecisse videatur.' Chaque nation est donc libre d'établir une surveillance et une police de ses côtes comme elle l'entend, à moins qu'elle ne soit liée par des traités. . . .

Tout navire qui franchit les limites maritimes d'une nation doit se conformer aux dispositions des règlements établis, peu importe qu'il soit entré, volontairement ou par suite d'une force majeure. A cet effet les États Riverains jouissent de certains droits incontestés, qui sont :

1o. Le droit de demander des explications sur le but du voyage du navire ; si la réponse est refusée ou si elle paraît inexacte, les autorités des lieux peuvent, par des voies directes, prendre connaissance du véritable but du voyage et, en cas d'urgence, prendre des mesures provisoires commandées par les circonstances ;

2o. Le droit d'empêcher que la paix ne soit troublée dans leurs eaux intérieures et d'y intervenir de facto ;

3o. Celui de faire des règlements relatifs à l'usage des eaux qui baignent les côtes, par exemple, le droit de régler les différentes espèces de pêche ;

4o. Le droit de mettre l'embargo et d'établir des navires croiseurs pour empêcher la contrebande ;

5o. Enfin le droit de juridiction."

Ortolan in his "Règles Internationales et Diplomatie de la Mer," 1 vol. p. 159, thus expresses himself "On sent que l'espace maritime soumis ainsi, non pas à un droit de propriété, mais à la souveraineté d'un Etat, doit être nécessairement renfermé dans d'étroites limites. C'est à ce régime complet que répondent expressément la dénomination de mer territoriale et la limite commune de la plus forte portée du canon.

Bluntschli, in "Le Droit International Codifié," Nos. 309, 310 says :

"309. Sont, dans de certaines limites, soumises à la souveraineté de l'Etat riverain, *a.* La bande de mer située à portée de canon de la côte, *b.* . . . &c.

"L'état riverain peut en conséquence prendre, à l'égard des parties de la mer ci-dessus désignées toutes les mesures de sûreté et d'ordre public qu'il juge nécessaires, et y réglementer la pêche et la navigation. Mais il n'est pas autorisé, en temps de paix, à interdire ou à entraver par des impôts la libre navigation dans les eaux dépendant de son territoire. 1o. L'état riverain peut, afin d'empêcher la contrebande, exiger des navires étrangers de n'aborder qu'à certains points du littoral; il peut pour sa sûreté interdire l'approche du rivage aux navires de guerre, etc. Certains pays défendent encore aux pêcheurs étrangers d'exercer leur profession dans les eaux dépendant de leur territoire; les autres puissances se soumettent, parce qu'on ne peut pas refuser à un Etat de réglementer la pêche sur son littoral."

Domin-Petrushevez in his "Précis d'un Code du Droit International," art. 6, says:

"Le droit de pêche entièrement libre en pleine mer, sera réglé exclusivement par les états respectifs dans leur territoire maritime, précisé dans l'article précédent."

*Vide also*, 1 Phillimore, No. 197; 1 Twiss, §173, §182.

It will be observed that the President in his Message does not deny the right of the Parliament of Canada to declare forfeited vessels found fishing illegally in the maritime territory of Canada; he apparently protests merely against the bringing of vessels hovering in British waters within three miles of the shore, into port, the examination under oath of the master, the infliction upon him of a heavy pecuniary penalty, if true answers are not given, and the forfeiture of the vessel, &c., if found preparing to fish within the maritime territory of Canada, all proceedings authorised by the Statutes referred to.

It may be taken for granted then, that the authorities of the United States admit that for a violation of Canadian territory, not included within the limits specified in Article 1 of the Convention of 1818, by fishing therein, the Canadian Parliament has a right to inflict the penalty of forfeiture upon the offending vessel, and there can be no doubt that such right is under International Law incontestable.

It is necessary then at the present stage to inquire whether the boarding and bringing of vessels hovering in the maritime terri-

tory of Canada, not within the limits specified in Article 1 of the Convention of 1818, into port, the examination of the master under oath, and the infliction of a penalty upon him if true answers are not given, are according to the principles of International Law and the practice of nations.

The boarding of vessels coming into the maritime territory of a State by the proper officers of that State, is one recognised and practised by all nations; the authorities already referred to show the law upon the subject.

The statutes of the United States expressly provide for such boarding by their officers.<sup>(21)</sup>

The examination of the master in command of such vessel is also recognized and admitted by both the United States and Great Britain. In fact the public Statutes of both countries assume the right of causing vessels on their arrival within four leagues of their coasts, to be boarded by their respective officers.

The statute of the United States, passed on the 2nd March, 1799, in the 80 section, thus provides:—

“If the master or other person having the charge or command of any ship or vessel laden as aforesaid, and bound to any port or place of the United States, shall not upon his arrival within four leagues of the coast thereof, or within the limits of any district thereof, where the cargo of such ship or vessel, or any part thereof is intended to be discharged, produce such manifest or manifests as are heretofore required in writing, to the proper officer or officers upon demand thereof; and also deliver such copy or copies thereof, as aforesaid, according to the directions of this Act in each case, or shall not give an account of the true destination of such ship or vessel, which he is hereby required to do upon request of such officer or officers; or shall give a false account of such destination, in order to evade the production of such manifest or manifests; the said master or other person having the charge or command of such ship or vessel shall forfeit for every such neglect, refusal, or offence, a sum not exceeding five hundred dollars.”

The statute of Great Britain, 9 Geo. 2, c. 35, also assumes jurisdiction over vessels within four leagues of the shores of the United Kingdom, but not to the extent of that assumed by the foregoing clause of the United States' statute.

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(21) 1 Brightley's Digest, pp. 148, § 41; 334, § 80.

It has already been demonstrated that the maritime territory of a State extends seawards to a distance of a cannon shot from its coasts, which distance is generally supposed to be three marine miles: over that maritime territory the right of sovereignty of the State possessing the coast is supreme: beyond that band of sea no State has rights of sovereignty—the ocean is *res nullius*, it is common property, and the United States never had any right to subject vessels at a distance of more than a cannon shot from their coasts to visitation and their masters to examination. And yet no complaint has been made of such usurpation, because other nations out of comity permitted the exercise of the rights claimed, conceiving them to be essential for the protection of the United States revenue.

The mere fact of a vessel hovering within three marine miles of any of the coasts, bays, creeks, or harbours of Canada, is a suspicious circumstance, and may justly engender suspicion of smuggling, even if not hovering on that portion of Canadian maritime territory not included in the limits specified in the Convention; if on the contrary the hovering be on the non-included portion, the intention to fish illegally is a presumption almost *de jure*—a fortiori if the preparations to fish therein are manifest.

In such cases, the practice of the United States Admiralty Courts, with respect to vessels sailing for legally blockaded ports of a belligerent is apposite.

According to the doctrine and practice of those Courts, the mere fact of a vessel sailing for a blockaded port, the master knowing it to be blockaded, is in itself an attempt to break the blockade, and an act sufficient to charge the party with a breach of the blockade without reference to the distance between the port of departure and the port invested, or to the extent of the voyage performed when the vessel was arrested.<sup>(22)</sup>

It is a presumption almost *de jure*, that the neutral if found on the interdicted waters, goes there with an intention to break the blockade; and it would require very clear and satisfactory evidence to repel the presumption of a criminal intent.<sup>(23)</sup>

(22) *Yeaton v. Fry* 5 Cranch 335; *The Nereide* 9, Cranch 440, 446.

(23) *Abdy's Kent*, p. 369; *The Neutralitat* 6, Rob. 30; *The Charlotte Christine*, *ib.* 101; *The Eute Erwartung*, *ib.* 282; *Bynk*, Q. I. Pub. b. 1, c. 11; *The Arthur* 1 Edw. Rep. 202; *Radcliff v. U. Ins. Co.* 7, Johns 47; *Fitzsummons v. Newport Ins. Co.* 4 Cranch 185; *The Josephine*, 3 Wallace U. S. Sup. Ct. R., page 83; *The Cheshire* *id.* 231; *The Ad-*  
*id.* 603.

The clauses set out of the Canadian Statutes, it must be remarked do not apply solely to vessels belonging to the United States—the terms made use of are general, and all foreign and British vessels are subject to their provisions, with the exception, of course, that British vessels are not liable to forfeiture for fishing or preparing to fish.

It is intimated in the President's Message that the regulations and provisions contained in the clauses in question infringe the provisions of the Convention of 1818. A very cursory examination of Article 1, of that Convention cannot fail to show the groundless nature of the insinuation :

ART. I.—Whereas differences have arisen respecting the liberty claimed by the United States, for the inhabitants thereof, to take, dry and cure fish, on certain coasts, bays, harbours, and creeks, of His Britannic Majesty's Dominions in America, it is agreed between the high contracting parties, that the inhabitants of the said United States, shall have, forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind, on that part of the southern coast of Newfoundland, which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbours and creeks, from Mount Joly, on the southern shore of Labrador to and through the Straits of Belleisle, and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson's Bay Company: and that the American fishermen shall also have liberty, forever, to dry and cure fish in any of the unsettled bays, harbours, and creeks, of the southern part of the coast of Newfoundland hereabove described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose, with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's Dominions in America, not included within the above mentioned limits; provided, however, that the American fishermen shall be admitted to enter such bays or harbours, for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

It may be proper here to notice the third charge contained in the President's Message; it is couched in the following words:

"It has been claimed by Her Majesty's officers that the fishing vessels of the United States have no right to enter the open ports of the British possession in North America except for the purposes of shelter and repairing damages, of purchasing wood and obtaining water; that they have no right to enter at the British custom-houses or to trade except the purchase of wood and water; and that they must depart within twenty-four hours after notice to leave. It is not known that any seizure of a fishing vessel carrying the flag of the United States has been made under this claim. So far as the claim is founded on an alleged construction of the Convention of 1818, it cannot be acquiesced in by the United States. It is hoped that it will not be insisted on by Her Majesty's Government. During the conferences which preceded the Convention of 1818, the British commissioners proposed to expressly exclude the fishermen of the United States from the privilege of carrying on trade with any of His Britannic Majesty's subjects residing within the limits assigned for their use, and also that it should not be lawful for the vessels of the United States engaged in such fishery to have on board any goods, wares or merchandise whatever, except such as were necessary for the prosecution of their voyages to and from the said fishing grounds, and any vessel of the United States which should contravene this regulation to be seized, condemned and confiscated with her cargo. This proposition, which is identical with the construction now put upon the language of the Convention, was emphatically rejected by the American commissioners, and thereupon was abandoned by the British plenipotentiaries, and Article 1 as it stands in the Convention was substituted. If, however, it be said that this claim is founded on provincial or colonial statutes, and not upon the Convention, this Government cannot but regard them as unfriendly and in contravention of the spirit, if not the letter of the treaty, for the faithful execution of which the Imperial Government is alone responsible."

As a general principle it may be laid down that a State has the exclusive right of regulating the importation of foreign goods into its territory, may prohibit such importation entirely, may admit goods on payment of duty, or may confine the entry of such goods to specified ports in its territory, No State has a right to interfere with the customs laws of another State. (24)

Under the first part of the article of the Convention of 1818, within the limits therein specified the inhabitants of the United States have, in common with British subjects, solely the rights to

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(24) Lawrence's Wheaton, Ed. 1863, pp. 160, 161, 174.

take, dry, and cure fish in the maritime territory of British North America. It cannot be pretended with any show of reason that, by that article, American fishermen have any greater privilege than other foreigners coming into the limits specified, save and except the rights of fishing and drying and curing fish, as therein expressly agreed; the effect of that first part of the article is not to vest in the United States a right of property in the said limits, but merely a right to make use of them in common with British subjects for the purposes agreed upon; there is no contract by which American subjects are declared to be free from the obligations imposed on vessels coming into British waters by the customs laws; there is no stipulation by which American vessels are permitted to engage in trade, on the coast, without entry under the customs laws of their cargoes; and yet the pretensions put forward in the Message are virtually to the effect that the inhabitants of the United States having by article 1, of the Convention of 1818, secured forever the liberty of fishing and drying and curing fish within certain limits, have thereby also the right of setting at nought the customs laws of Canada and of carrying on trade throughout the maritime portion of British North America without being trammelled by the statutes regulating imports. The question raised by the President may then be put in these words:

Does article 1 of the Convention of 1818, by which it was agreed between Great Britain and the United States, that the inhabitants of the United States should forever have the right of fishing in common with British subjects within certain limits, of drying and curing fish within certain other limits, and by which permission was granted to American fishermen to enter bays, and harbours, not included within the specified limits for the purpose of shelter and repairing damages, purchasing wood and procuring water, and for no other purpose whatever, give to American fishermen the right of carrying on trade throughout the whole maritime territory of Canada, free from, and untrammelled by, the provisions of their customs laws?

The only answer which can be given by a lawyer to this question is a negative.

If there was any difficulty in the interpretation of the terms made use of in article 1 of the Convention of 1818, reference might perhaps be permitted to the negotiations preceding it to explain an ambiguity, but where the meaning of the words used

is not susceptible of being misunderstood the ordinary rules regulating contracts must be applied and the Convention alone must be looked to as the binding agreement between the high contracting parties. "

Moreover upon that point the idea of United States commissioners overruling themselves in negotiating a treaty with Great Britain is so novel and refreshing to Canadians, that no pains should be spared on our part to preserve a phenomenon of such excessively rare occurrence.

For the sake of argument however, placing the wildest construction possible upon the first part of the article in question, it may be taken for granted that within those limits the inhabitants of the United States have the same rights as British subjects. But British subjects have no right to bring into any portion of those limits foreign goods which have not paid duty to Canada, Prince Edward Island, or Newfoundland, as the case may be, and taken trade away, or sell such goods within those limits. Consequently citizens of the United States have no such right; they can purchase in Canada, Prince Edward Island, or Newfoundland, goods which have been regularly entered, and on which duty has been paid in any of those countries, and sell them in the maritime territory of the country wherein the duty was paid, if the second part of the article does not prohibit such trading; but as for importing foreign goods, they clearly must enter them at some British custom-house, and pay the duty, ere offering them for sale in British maritime or land territory.

But here again the latter portion of the article interposes a serious obstacle. By it American fishermen can only enter bays or harbours not included within the specified limits, for the four purposes " of shelter and of repairing damages, of purchasing wood, and of obtaining water." Now, unfortunately for American fishermen, there is not a port of entry, belonging to Canada, within the limits specified in the article, save in the Magdalen Islands,—all the ports of entry, with that exception, being in that portion of Canada not included within the specific limits, so that the purpose of entering goods not being one of the four purposes for which alone American fishermen can enter Canadian ports or harbours, not included in the specified limits, they cannot enter a Canadian port of entry, save in the Magdalen Islands, for the purpose of entering goods.



Moreover it is clear that once having entered a port, they are limited to doing that which they are specially authorised to do there, and nothing else, and are bound to leave so soon as the purpose for which they entered is accomplished; and Great Britain clearly has a right to insist upon such leaving as one of the restrictions under which by the Convention that power has a right to place American fishermen, to prevent their abusing the privileges reserved to them.

It may be interesting here to examine the facilities for trade granted by the United States Government to their own fishermen. By the Act of 18 Feb. 1793, § 1, 1 Stat. 305, § 2, it is provided—

“After the last day of May next, every ship or vessel of twenty tons or upwards (other than such as are registered) found trading between district and district, or between different places in the same district, or carrying on the fishery without being enrolled and licensed, or if less than twenty tons, and not less than five tons in manner as provided by the act, such ship or vessel, if laden with goods the growth or manufacture of the United States only (distilled spirits excepted,) or in ballast, shall pay the same fees and tonnage in every port of the United States at which she may arrive, as ships or vessels not belonging to a citizen or citizens of the United States, and if she have on board any articles of foreign growth or manufacture, or distilled spirits, other than sea stores, the ship or vessel together with her tackle, apparel and furniture and the lading found on board shall be forfeited.” (26)

By the Act of the 18th Feb., 1793 § 21, 1 Stat. 323, § 13, it is provided “and if any ship or vessel licensed for carrying on the fisheries, shall be found within three leagues of the coast, with goods, wares or merchandize of foreign growth or manufacture, exceeding the value of five hundred dollars, without having such permission as is herein directed, such ship or vessel, together with her goods, wares or merchandize of foreign growth or manufacture, imported therein, shall be subject to seizure and forfeiture.” (27)

It will thus be seen that the United States fishermen are not

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(26) Brightley's Digest, p. 139.

(27) 1 Brightley's Digest, p. 286.

allowed to enter an American port or to come within three leagues of the coast of their own country with foreign goods on board exceeding five hundred dollars, and in fact in certain cases if they do enter a home port with *any* foreign goods on board, they and their lading are forfeited; and yet in the face of such legislation the President of the United States pretends that American fishermen should have powers in Canadian maritime territory which are denied to them in the United States and that they should have greater privileges accorded them there than are granted to other foreigners and British subjects.

It may readily be taken for granted that the United States Government does not afford greater facilities to British than to its own fishermen, and as the coasting trade is, in the United States, closed to foreign bottoms, it may readily be imagined how a claim to trade, similar to that now urged by the President, by British fishermen in United States maritime territory, would have been received even during the existence of the Reciprocity Treaty.

But as has been already observed, the rights of American fishermen are to be measured by the Convention—they have the rights of taking, drying and curing fish thereunder, they have no right to trade or to bring foreign goods, save sea stores, into Canadian maritime territory; if they do attempt to trade in such foreign goods within the jurisdiction of Canada they are liable to the pains and penalties inflicted upon smugglers.

Moreover by the latter part of Art. 1, the Government of Great Britain and the United States agreed expressly that American fishermen should be admitted to enter the bays and harbours in the non-included limits, solely for the purposes of shelter, repairing damages, of purchasing wood, and obtaining water, and *for no other purpose whatever*—that admission moreover was to be given under such restrictions as might be necessary to prevent their abusing those privileges. Clearly then restrictions were considered necessary by both powers, and were to be framed and put in force, but as the privileges extended over British maritime territory, it is equally clear that to Great Britain was reserved under the said article her incontestable right of framing the conditions, under which foreign vessels should be allowed to enter British waters, in accordance with the provisions of the Convention. This authority has been legally delegated to Canada by Great Britain; it has been exercised by the Canadian Parliament

with moderation, in accordance with the principles of International Law and the provisions of the Convention of 1818; and the restrictions imposed are not as severe as those framed by the United States Government for the protection of its own revenue, coasting trade, and fisheries.

WILLIAM H. KERR.

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APPENDIX.

No. 1.

The definitive Treaty of Peace and Friendship between his Britannic Majesty and the United States of America; signed at Paris, the 3rd of September, 1783.

ART. III.—It is agreed, that the people of the United States shall continue to enjoy, unmolested, the right to take fish of every kind on the Grand Bank, and on all the other banks of Newfoundland; also in the Gulf of St. Lawrence, and at all other places in the sea where the inhabitants of both countries used at any time heretofore to fish. And also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use (but not to dry or cure the same on that island,) and also on the coasts, bays, and creeks of all other of His Britannic Majesty's dominions in America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbours, and creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same, or either of them, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlement without a previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground.

No. 2.

Convention between Great Britain and the United States, signed at London, October 20, 1818.

ART. I.—Whereas differences have arisen respecting the liberty claimed by the United States, for the inhabitants thereof, to take, dry and cure fish, on certain coasts, bays, harbours, and creeks, of His Britannic Majesty's Dominions in America, it is agreed between the

high contracting parties, that the inhabitants of the said United States, shall have, forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind, on that part of the southern coast of Newfoundland, which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbours and creeks, from Mount Joly, on the southern shore of Labrador to and through the Straits of Belleisle, and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson's Bay Company : and that the American fishermen shall also have liberty, forever, to dry and cure fish in any of the unsettled bays, harbours, and creeks, of the southern part of the coast of Newfoundland hereabove described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose, with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's Dominions in America, not included within the above mentioned limits; provided, however, that the American fishermen shall be admitted to enter such bays or harbours, for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

### No. 3.

Treaty between Great Britain and the United States, relative to Fisheries, Commerce, and Navigation, signed at Washington, June 5, 1854 :

ART. 1.—It is agreed by the High Contracting Parties, that in addition to the liberty secured to the United States fishermen by the above mentioned Convention of October 20, 1818, of taking, curing, and drying fish on certain coasts of the British North American Colonies therein defined, the inhabitants of the United States shall have, in common with the subjects of Her Britannic Majesty, the liberty to take fish of every kind, except shell-fish, on the sea-coasts and shores, and in the bays, harbours, and creeks of Canada, New Brunswick, Nova Scotia, Prince Edward's Island, and of the several islands thereunto adjacent, without being restricted to any distance from the

shore; with permission to land upon the coasts and shores of those Colonies and the islands thereof, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish: provided that in so doing they do not interfere with the rights of private property, or with British fishermen in the peaceable use of any part of the said coast in their occupancy for the same purpose.

It is understood that the above mentioned liberty applies solely to the sea fishery, and that the salmon and shad fisheries, and all fisheries in rivers, and the mouths of rivers, are hereby reserved exclusively for British fishermen.

## No. 4.

*Circular relating to Canadian In-Shore Fisheries.*

TREASURY DEPARTMENT,  
WASHINGTON, June 9, 1870.

SIR,—In compliance with the request of the Secretary of State, you are hereby authorised and directed to inform all masters of fishing vessels, at the time of clearance from your port, that the authorities of the Dominion of Canada have terminated the system of granting fishing licenses to foreign vessels, under which they have heretofore been permitted to fish within the maritime jurisdiction of the said Dominion, that is to say, within three marine miles of the shores thereof; and that all fishermen of the United States are prohibited from the use of such in-shore fisheries, except so far as stipulated in the first article of the Treaty of October 20, 1818, between the United States and Great Britain, in virtue of which the fishermen of the United States have, in common with the subjects of Her Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbours, and creeks, from Mount Joly, which was, when the treaty was signed, on the southern coast of Labrador, to and through the Straits of Belleisle, and thence northwardly, indefinitely along the coast, without prejudice, however, to any exclusive rights of the Hudson's Bay Company; and have liberty forever to dry and cure fish in any of the unsettled bays, harbours, and creeks, of the southern part of the coast of Newfoundland, above described, and of the coast of Labrador, unless the same, or any portion thereof, be settled, in which case it is not lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants,

proprietors, or possessors of the ground; and also, are admitted to enter any other bays or harbours, for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever, subject to such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges reserved to them as above expressed. *Fishermen of the United States are bound to respect the British laws and regulations for the regulation and preservation of the fisheries to the same extent to which they are applicable to Canadian fishermen.*

The Canadian law of the 22d of May, 1863, 31 Victoria, cap. 61, intituled "An Act respecting fishing by foreign vessels," and the Act assented to on the 12th May, 1870, intituled "An Act to amend the Act respecting fishing by foreign vessels," among other things, enact that any commissioned officer of Her Majesty's navy, serving on board of any vessel of Her Majesty's navy, cruising and being in the waters of Canada for the purpose of affording protection to Her Majesty's subjects engaged in the fisheries, or any commissioned officer of Her Majesty's navy, fishery officer, or stipendiary magistrate, on board of any vessel belonging to or in the service of the Government of Canada, and employed in the service of protecting the fisheries, or any officer of the customs of Canada, sheriff, magistrate, or other person duly commissioned for that purpose, may go on board of any ship, vessel, or boat, within any harbour in Canada, or hovering (in British waters) within three marine miles of any of the coasts, bays, creeks, or harbours in Canada, and stay on board so long as she may remain within such place or distance; and that any one of such officers or persons as are above mentioned may bring any ship, vessel, or boat being within any harbour in Canada, or hovering (in British waters) within three marine miles of any of the coasts, bays, creeks, or harbours in Canada, into port, and search her cargo, and may also examine the master upon oath, touching the cargo and voyage; and if the master or person in command shall not truly answer the questions put to him in such examination, he shall forfeit four hundred dollars; and if such ship, vessel, or boat, be foreign, or not navigated according to the laws of the United Kingdom, or of Canada, and has been found fishing or preparing to fish, or to have been fishing (in British waters) within three marine miles of any of the coasts, bays, creeks, or harbours of Canada, not included within the above mentioned limits, without a license, or after the expiration of the period named in the last license granted to such ship, vessel, or boat, under the first section of this Act, such ship, vessel, or boat, and the tackle, rigging, apparel, furniture, stores, and cargo thereof, shall be forfeited. And that all goods, ships, vessels, and boats, and the tackle, rigging, apparel, furniture, stores, and cargo, liable to forfeiture under this Act, may be seized and secured by any officers or persons mentioned in the second section of this Act. And every person opposing any

officer or person in the execution of his duty under this Act, or aiding or abetting any other person in any opposition, shall forfeit eight hundred dollars, and shall be guilty of a misdemeanor, and upon conviction be liable to imprisonment for a term not exceeding two years.

*It will be observed, that the warning formerly given is not required under the amended Act, but that vessels trespassing are liable to seizure without such warning.*

On the 8th of January, 1870, the Governor General of the Dominion of Canada, in Council, ordered that suitable sailing vessels, similar to the "*La Canadienne*," be chartered and equipped for the service of protecting the Canadian inshore fisheries against illegal encroachments by foreigners, these vessels to be connected with the police force of Canada, and to form a marine branch of the same. It is understood that, by a change of the boundaries between Canada and Labrador, the Canadian Territory now includes Mount Joly, and a portion of the shore to the east thereof, which, in the Treaty of 1818, was described as the southern coast of Labrador. This municipal change of boundary does not, however, interfere with the rights of American fishermen, as defined by the treaty, on that portion of what was the southern coast of Labrador, east of Mount Joly.

Very respectfully,

Geo. S. BOUTWELL,

*Secretary of the Treasury.*

## L'ARBITRAGE PROVINCIAL.

L'article 142 de l'Acte de l'Amérique Britannique du Nord, 1867, déclare : "Le partage et la répartition des dettes, crédits, obligations, propriétés et de l'actif du Haut et du Bas-Canada seront renvoyés à la décision de trois arbitres, dont l'un sera choisi par le gouvernement d'Ontario, l'un par le gouvernement de Québec et l'autre par le gouvernement du Canada ; le choix des arbitres n'aura lieu qu'après que le parlement du Canada et les législatures d'Ontario et de Québec auront été réunis ; l'arbitre choisi par le gouvernement du Canada ne devra être domicilié ni dans Ontario ni dans Québec." L'acte ne contient aucune autre disposition sur l'Arbitrage Provincial.

Conformément à cette clause, trois arbitres furent choisis : L'honorable J. H. Gray, M. P., pour le Gouvernement du Canada ; l'honorable Juge C. D. Day, pour le Gouvernement de Québec, et l'honorable D. L. Macpherson, Sénateur, pour le Gouvernement d'Ontario. Les honorables arbitres commencèrent à procéder ; mais avant l'enquête, la plaidoirie des parties et l'instruction finale de la cause, l'honorable Juge Day envoya au Gouvernement de Québec sa résignation, qui fut acceptée et signifiée sans délai aux deux autres arbitres. Malgré les protestations de la Province de Québec, les honorables Gray et Macpherson jugèrent qu'ils avaient le pouvoir de continuer la procédure et de décider seuls la matière de l'arbitrage ; et de fait le 1er Septembre dernier, après avoir tenu plusieurs séances où la Province d'Ontario fit sa preuve et fut entendue au mérite, en l'absence de l'avocat du Gouvernement de Québec, une sentence fut rendue par la majorité des arbitres, pour les raisons énoncées dans leur rapport et qui sont aussi exposées dans le *Canada Law Journal* de Toronto.\*

La Province de Québec, qui s'estime lésée par cette sentence, proteste contre sa justice et sa légalité ; et à la prochaine session du Parlement du Canada, la question sera soumise à la Chambre des Communes. Nous espérons qu'une étude du sujet uniquement au point de vue du droit et en dehors de toute considéra-

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\* Livraison d'août 1870, pp. 212-218.



tion ou influence politique, ne sera pas sans intérêt au Barreau en particulier et au public en général.

La loi commune de l'Angleterre, spécialement introduite en matières civiles dans la Province d'Ontario, exige l'unanimité des arbitres dans les arbitrages d'une nature privée, à moins que le contraire ne soit stipulé dans le compromis ou la soumission. Au contraire, dans la Province de Québec, où le droit commun Français gouverne, la majorité est alors suffisante, à moins que ce pouvoir ne soit enlevé par le compromis. Enfin en matière d'arbitrage public, la règle du droit commun Anglais est que la majorité suffit, même lorsque la commission des arbitres est silencieuse à cet égard; et c'est cette règle que les honorables Gray et Macpherson ont cru devoir adopter.

Après avoir cité une couple d'arrêts plus ou moins douteux des tribunaux anglais et quelques décisions plus positives des cours américaines, les honorables arbitres concluent: "These cases then determine that in matters of public arbitration or reference, though provisions to that effect be not specially made, the decision of a majority shall be incident to the reference. The 142nd section of the British North America Act, 1867, must come within this rule; were it not so intended, the section would be superfluous, because one party in a great question of public importance could prevent a decision."\*

Les honorables arbitres sont d'opinion que cette règle du droit commun anglais doit s'appliquer à l'Acte de l'Amérique Britannique du Nord, parceque s'il en était autrement, l'une des parties pourrait empêcher une décision. Véritablement, on a raison d'être surpris d'entendre des juges, saisis d'une cause aussi importante que celle de l'Arbitrage Provincial, décider des questions de droit sur des motifs *ab inconvenientibus*. Comme tous juges, les honorables arbitres étaient chargés d'appliquer la loi et non pas de la réformer; ils devaient juger sans égard aux inconvénients, sans même considérer si la commission deviendrait caduque ou illusoire avec la règle de l'unanimité des arbitres.

N'est-il pas étonnant de voir des légistes anglais s'alarmer des vices et des dangers du principe de l'unanimité arbitrale, eux qui sont appelés tous les jours à le mettre en pratique, lorsqu'il s'agit des intérêts privés qui pourtant sont dans certains cas d'une grande valeur? Enfin, s'il est un cas où ce principe doit être

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\* Canada Law Journal, vol. 6, p. 215.

accepté, c'est celui de l'arbitrage public, parcequ' alors les matières en litige sont en général d'une haute importance et qu'elles nécessitent les meilleures conditions d'un juste examen ? Faut-il ajouter que la décision unanime des arbitres offre plus de garantie que celle de la majorité.

Mais laissons là les données de la raison et du bon sens, pour nous arrêter au droit particulier consacré par les honorables Gray et Macpherson.

Lorsque l'honorable juge Day se retira, la cause n'était pas finalement instruite, ni prête à être jugée, l'enquête n'étant pas même commencée. En référant au rapport du *Canada Law Journal*, tout bref qu'il soit sur les faits, on voit que cette résignation fut amenée par la décision d'un point préliminaire, et qu'enfin, immédiatement après avoir prononcé sur l'effet de la résignation de leur collègue, "the arbitrators then proceeded to hear the arguments of counsel for Ontario on several of the heads stated in the printed case for that Province, and some progress having been made, the arbitration was adjourned until the next day." De fait plusieurs séances furent tenues après la résignation de l'honorable juge Day, où la Province d'Ontario procéda *ex parte* à sa preuve et à sa plaidoirie au mérite.

La première question que les deux arbitres restant en office avaient à examiner, était de savoir s'ils avaient juridiction pour continuer l'instruction de la cause. C'est ce qu'ils n'ont pas fait. Autre chose est le pouvoir de la majorité de décider un litige en état d'être jugé et autre chose est celui de poursuivre et compléter seule une instruction commencée devant tous les arbitres.

N'est-ce pas un principe élémentaire du droit Anglais et du droit Français que l'instruction d'une cause commencée devant certains juges, qui en sont saisis, doit être terminée devant les mêmes juges, sauf à la majorité, s'il y a lieu, le droit de juger, et ce à peine de nullité. Cette règle de procédure est strictement suivie dans toutes les juridictions judiciaires, tant en Angleterre qu'à Québec et à Ontario.

Supposons que l'honorable juge Day fut décédé durant le cours de l'instruction, en tout temps avant le jugé du litige, pourrait-on soutenir qu'une nouvelle commission ne fut devenue nécessaire, tout comme si aucun procédé n'eût été fait ? Et pourquoi en serait-il autrement, lorsque l'un des arbitres se retire durant l'instruction, et qu'il laisse ainsi sa partie principale sans représentant dans la cause ?

Les honorables arbitres n'ont cité aucune autorité, ni donné aucune raison pour établir une exception à l'égard des procédures devant des arbitres; et l'on peut affirmer de suite, sans craindre de se tromper, que la chose leur était impossible. Les précédents mêmes qu'ils invoquent comme reconnaissant à la majorité des arbitres le droit de juger, sont sur la question de procédure contraires à la position qu'ils ont assumée.

Dans la cause de *Green v. Miller* \* "all the arbitrators met and heard the proofs and allegations of the parties." Dans celle de *Grinley v. Barker* † "all the arbitrators were regularly assembled," lors de la reddition du jugement. Ces deux cas sont pourtant les principales autorités des honorables arbitres; et si l'on ajoute que ces quelques lignes se trouvent dans leurs citations mêmes, on ne peut s'empêcher de se demander comment ils ont entièrement négligé de prendre en considération ce premier point de leur juridiction? Le public ne s'en étonnera pas lorsqu'il apprendra que l'un des honorables arbitres a été forcé de faire dans son rapport ce remarquable aveu: "*Unskilled as I am in legal technicalities, taking an equitable common sense view of the question,*" &c. C'est donc de l'équité et du *common sense* (qui n'est pas toujours le bon sens, surtout en matières légales), et non du droit, que les honorables juges ont voulu consacrer par leur sentence. Personne ne doit maintenant être surpris qu'ils n'aient donné aucune attention à la condition *sine qua non* que leurs autorités prescrivent pour la validité du vote final de la majorité des arbitres, savoir, que la cause doit être en état d'être jugée? Elle leur a paru sans doute une *legal technicality*, aussi peu compréhensible que pratique. En lisant les rapports des deux causes déjà citées, on verra que les juges Anglais et Américains, qu'ils ont prétendu suivre, sont d'un avis différent.

Les décisions anglaises ne manquent pas sur cette partie du sujet.

Dans une cause de *Thorpe v. Cooper*, ‡ le lord juge-en-chef Best disait: "Awards made under acts of Parliament are governed by the same rules as apply to awards made on the submissions of individuals"; et il n'y a aucun doute qu'en matière d'arbitrage privé, la cause doit être instruite devant tous les arbitres. "The award of the arbitrators," disait le juge Coleridge *in re Wade v. Dowling*, § "must be done *simul* and *semel*." ||

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\* 6 Johns. 38.

† 1 Bos. & Pul. 236.

‡ 5 Bing. 16, 1828.

§ 1854 Eng. L. & Eq. Rep. 107.

|| Voir aussi *Peterson v. Ayre* (30 ib. 535).

Dans la cause de *King v. Whitaker*, \* citée par l'avocat d'Ontario, et où il s'agissait d'un arbitrage en vertu d'un statut, le lord juge-en-chef Tenterden s'exprima ainsi : " Now if by law an apportionment made by two according to their opinion, *after a meeting of all three*, is good, we ought not to grant a *mandamus* to the three; and we are of opinion that by law an apportionment made by the two (*the three having met*), is a good apportionment." Ici comme dans les autres cas, tous les arbitres ont siégé jusqu'au jugé du litige.

En référant à *Caldwell on Arbitration*, à l'endroit cité par les honorables arbitres, † on trouve la même règle clairement énoncée : " Referees," dit-il, " appointed under a statute must all meet and hear the parties, but the decision of the majority will be binding."

Aux Etats-Unis, où le droit commun anglais domine, tous les arbitres, en matière publique comme en matière privée, doivent entendre les parties avant que la majorité puisse se prononcer. C'est ce qu'indique la décision en cause de *Green v. Miller* déjà mentionnée, et c'est aussi la doctrine qu'ont consacrée plusieurs autres arrêts : " If all had heard the parties," disait le Juge-en-Chief Parsons in re *Swet v. Pratt*, " two might have made a report against the assent of the third: but his opinion and arguments might have had an influence on the judgments of the others and have produced a different report although he might finally have dissented." Dans la cause de *Cumberland v. North* *Parsons* ‡ *Malin* C. J. disait : " After a joint hearing of the parties and their agents in the first instance and before a re-examination, one of the referees absent immediately, or refuse to consult with his brethren, or to give any opinion, then the two others have full power to decide the cause upon the evidence previously produced and heard by all."

Si cette loi commune est en force dans la Province d'Ontario, si elle l'est dans tous les cas supérieurs au niveau de l'Acte de l'Amérique Britannique du Nord comme l'on suppose les

\* 2 Ex. & C. 245.

† 20 212.

‡ *Swet v. Pratt*, 2 Mass. 445; *Whitaker & Baker* 14 N. H. 235. *Parsons v. Rogers*, 12 Mass. 205; *Parsons v. Pratt*, 1 Mass. 211. *Compbell v. Rogers*, 5 N. H. 235. *Jones v. Green*, 7 Conn. 221. *Smith v. Jones*, 5 Conn. 212. *Chapman v. National*, 12 Mass. 235.

§ 4 Statute, 1855.

honorables arbitres, comment ont ils pu l'ignorer, vu encore qu'elle est conforme au droit commun de la Province de Québec ?

L'article 1346 de notre Code de Procédure Civile déclare que "les arbitres doivent entendre les parties et leur preuve respective" ; et l'article 1348 ajoute que "le compromis demeure sans effet dans le cas de décès, refus, déport ou empêchement d'un des arbitres," ou suivant la version anglaise, "in the case of death, refusal, WITHDRAWAL, or inability to act of one of the arbitrators."

En référant aux commentateurs, on verra que tel a toujours été et tel est encore le droit commun de la France. "Les arbitres," dit Mongalvry,\* "doivent coopérer simultanément à tous les actes de l'instruction, à tous les procès verbaux de leur ministère, comme enquêtes, interrogatoires sur faits et articles," &c.†

Ces règles sont de droit immémorial ; on les retrouve dans le droit romain, dont les maximes appuyées généralement sur le droit naturel ont si largement passé dans le domaine du droit public moderne. "S'il y a trois arbitres," dit La Combe,‡ "la signature de deux est suffisante ; mais il faut qu'ils opinent tous ensemble : *Sufficere duorum consensum si praesens fuerit et tertius, ALIOQUIN ABSENTE EO, LICET DUO CONSENTIANT, ARBITRIUM NON VALERE ; quia in plures fuit compromissum, et potuit praesentia ejus trahere eos in ejus sententiam.*" §

En voilà plus qu'il ne faut pour démontrer qu'en supposant que la majorité des Arbitres Provinciaux avait pouvoir de juger l'objet de l'arbitrage, elle n'avait pas pouvoir d'entendre la continuation de l'instruction de la cause, comme la preuve et la plaidoirie d'une des parties. Même du consentement des deux Provinces, cette procédure eût été irrégulière et nulle ; car elle n'est pas autorisée par le statut qui établit leur juridiction.

Mais, dira-t-on, ces règles ne concernent que les arbitrages nationaux ou intérieurs. A cette objection nous répondons d'abord que c'est ainsi que les honorables Gray et Macpherson ont considéré l'Arbitrage Provincial.

\* Traité de l'Arbitrage, p. 249.

† Pothier, Proc. Civile, p. 109 ; Code de Proc. Français, art. 1011—1012 ; arrêt de la Cour de Cassation du 2 Sept. 1811, D., t. 1er, 687 ; De La Bilennerie, De l'Arbitrage, pp. 196—207.

‡ Jurisprudence Civile, Vo. Compromis, No. 3.

§ L. 17, § 7, de recept. qui arbitr.

Et pourquoi en serait-il autrement à propos de l'arbitrage inter-colonial, lorsque l'acte qui l'ordonne n'a pas de disposition sur le sujet? "Les arbitres," dit d'ailleurs Fiore,\* "ne peuvent procéder séparément et doivent se réunir pour prononcer la sentence définitive." Heffter† dit encore: "Lorsque plusieurs arbitres ont été nommés sans que leurs fonctions respectives aient été déterminées d'avance, ils ne peuvent, suivant l'intention présumée des parties, procéder séparément."

Passons maintenant à l'examen de la seconde et dernière partie du sujet. La sentence arbitrale doit-elle être unanime ou simplement à la pluralité des voix?

Le savant avocat pour la Province d'Ontario a prétendu dans sa plaidoirie que l'Acte d'Interprétation des statuts de la Puissance du Canada s'appliquait à l'article 142 de l'Acte de l'Amérique Britannique du Nord, 1867. Or, cet acte déclare:‡ "Lorsqu'un acte ou une chose doit être accompli par plus de deux personnes, la majorité d'entr'elles peut l'accomplir." Il est clair que ce statut, passé par une législature coloniale dans le but d'interpréter ses propres ordonnances (voir préambule de l'acte), ne peut s'appliquer à un statut impérial. En toute justice, il faut ajouter que les honorables arbitres n'ont pas cru devoir adopter cet étrange argument du savant avocat. Ils n'y font pas même allusion dans les notes de leur jugement.

Suivant le rapport des honorables arbitres, ils avaient pouvoir de décider seuls, uniquement parceque le droit commun anglais leur donne ce pouvoir.

L'on pourrait peut-être mettre en question l'autorité résultant des quelques décisions anglaises invoquées à l'appui de cette doctrine. Elles paraissent contraires à la doctrine énoncée par le lord juge-en-chef Best dans la cause de *Thorpe v. Cooper*; et elles sont si isolées et elles ont été rendues à une époque si éloignée, qu'on peut douter de leur exactitude, aujourd'hui surtout qu'elles paraissent oubliées dans la pratique. Il est difficile de trouver dans les récents statuts de l'Angleterre et des Etats-Unis, ordonnant des arbitrages publics, un seul exemple où le législateur n'ait pas pris le soin d'autoriser la majorité des arbitres à décider. Pourquoi les parlements de ces pays seraient-ils si particuliers à accorder un pouvoir qui existerait de droit commun?

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\* Dr. Inter. p. 207.

† Dr. Inter. p. 207.

‡ Section 8e.

Admettons pour le moment l'existence de ce droit commun anglais. Est-il applicable au cas actuel ?

Les autorités citées par les honorables arbitres maintiennent qu'il y a une exception à la règle générale ; c'est lorsque la volonté présumée du législateur est qu'il y ait unanimité parmi les arbitres. "The question," a-t-on dit dans la cause de *Grinley v. Barker*, "*is still open whether on the construction of this particular statute, it does not appear that the arbitrators should concur.*"

Pour connaître l'intention de la clause 142e. de l'Acte de l'Amérique Britannique du Nord, 1867, il faut s'enquérir du but que se proposaient le Parlement Impérial et les Provinces de Québec et d'Ontario.

Chacune de ces provinces avait des intérêts immenses à sauvegarder, avant de consentir au nouveau régime ; chacune savait que le partage de leur actif et passif, alors en commun sous l'Acte d'Union de 1840, serait un terrain brûlant où leur intérêt matériel pourrait être sacrifié ; chacune prévoyait enfin que la question de la dette du Haut Canada, lors de son entrée dans l'Union, provoquerait de vives discussions. Les deux provinces ont donc dû s'entendre sur les meilleures garanties d'un règlement juste et équitable.

De plus, le Gouvernement Impérial voulait donner au système fédéral des bases solides. Il était par conséquent de la plus haute importance d'assurer une harmonie durable entre les deux plus grandes provinces de la Confédération. Le Gouvernement de la mère-patrie n'a pas été sans prévoir que cette harmonie serait menacée, sinon totalement brisée par un partage injuste de leurs biens. De là l'urgence d'adopter sur cette question vitale des mesures qui empêcheraient le mécontentement et même l'ombre d'une injustice. Aussi le Parlement Impérial n'a pas voulu se charger du règlement de cette délicate affaire, dans la crainte sans doute d'inspirer de la défiance ; il l'a soumise au jugement de trois arbitres, dont deux devaient être nommés par chacune des parties au partage et l'autre par le Gouvernement du Canada, aussi intéressé que les provinces mêmes à la paix et à l'union entr'elles. Enfin ces arbitres devant être unanimes, toute récrimination et toute plainte devenaient impossibles ; et la satisfaction des populations des deux provinces comme le succès du régime fédéral devenaient pour ainsi dire un fait accompli.

Si de telles considérations ne font pas voir que l'intention du

statut Impérial est que les Arbitres Provinciaux soient unanimes, alors la règle posée en cause de *Grinley v. Barker*, qu'il faut avant tout consulter l'esprit du législateur, est fausse et illusoire.

Mais, dira-t-on, si telle était l'intention du législateur, pourquoi ne l'a-t-il pas déclarée en termes formels ? Suivant l'autorité de *Grinley v. Barker* et d'autres précédents, cette déclaration expresse n'est pas nécessaire ; il suffit qu'elle puisse tacitement être déduite du texte du statut et des circonstances. Et même a-t-on besoin d'expressions plus précises que celles de l'Acte de l'Amérique Britannique du Nord ? Pourquoi le législateur sera-t-il supposé avoir ordonné que la majorité des arbitres suffira, lorsqu'il dit purement et simplement que la question sera soumise à la décision de trois arbitres, sans même indiquer que l'un d'eux agira comme *tiers arbitre* ou *umpire* ? Ne peut-on pas soutenir avec raison que si le Parlement Impérial eût voulu autoriser la simple majorité à décider, il en aurait ainsi ordonné, comme il le fit d'ailleurs dans des occasions analogues.

Les exemples de ces arbitrages entre colonies sont rares ; mais on peut en citer. Lorsqu'en 1822, alors qu'il s'agissait d'un arbitrage entre ces mêmes provinces, le Parlement Impérial passa le *Canada Trade Act*,\* s'est-il exprimé comme dans l'Acte de l'Amérique Britannique du Nord ? Puisque ces actes sont soumis aux règles ordinaires sur les arbitrages publics, pourquoi n'a-t-il pas tout simplement gardé le silence ? Non, il voulait que la majorité des trois arbitres eut pouvoir de juger ; et supposant que ce pouvoir n'existait pas de droit commun, il déclara à la section 21e *that the award of the majority of the said arbitrators shall be final and conclusive*. Il ne faut pas s'imaginer que le langage du législateur est quelquefois superflu et inutile. Les principes veulent qu'il ne parle que pour combler une lacune, corriger un vice du droit commun ou au moins pour en faire disparaître les doutes.†

La règle que le principe de la majorité ne s'applique pas aux arbitrages intercoloniaux a son fondement dans l'essence même des choses, dans l'existence des colonies et la nature de l'objet de l'arbitrage intercolonial.

Les précédents cités par les honorables arbitres n'ont en effet aucun rapport au cas actuel. Là, il ne s'agissait que d'arbitrages

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\* 3 Geo. IV, C. 119.

† Dwarries on Statutes, p. 637, 641.



publics intéressant une faible portion d'un même État. Ici, il s'agit d'un arbitrage entre des pays distincts et étrangers l'un à l'autre quant à leurs biens, leurs lois et leurs législatures locales. Peut-on avec raison et logique appliquer à cet arbitrage les règles qui régissent les arbitrages publics ordinaires, ordonnés dans l'intérêt d'un certain nombre des membres d'une même nation et d'un même gouvernement ?

Et par quelle autorité les honorables arbitres imposent-ils ce droit commun anglais à la Province de Québec ? Est-ce parce que l'Acte de l'Amérique Britannique du Nord, étant un acte Impérial, devrait être interprété suivant le droit commun anglais, qui en serait pour ainsi dire le complément ? C'est ce que les honorables arbitres ont omis de nous faire connaître. Peu importe ! L'acte Impérial, étant exécuté en dehors du territoire de la Grande Bretagne, n'apporte pas avec lui le droit commun anglais ; car aucune partie de ce droit ou des actes Impériaux ne s'étend aux colonies sans une déclaration expresse des Parlements compétents. Sans une telle introduction, la Province de Québec ne reconnaît aucune des lois anglaises, excepté celles qui se rapportent à la Couronne.\* Sous tous les autres rapports, elle a ses lois propres, et elle ne peut par conséquent admettre le principe du droit anglais introduit seulement par les honorables arbitres Gray et Macpherson.

Mais, dira-t-on, la règle du droit commun anglais doit servir d'interprétation au statut Impérial, parcequ'elle fait partie du droit commun de la Province d'Ontario. Ainsi, ce serait la force du droit colonial et particulier de l'une des parties à l'arbitrage qui devrait gouverner. Je comprendrais ce raisonnement si les arbitres avaient été nommés en vertu d'un statut de la Province d'Ontario, et s'il s'agissait d'un arbitrage public entre les membres de cette colonie. Mais ici les arbitres procèdent en vertu d'un statut Impérial, qui ne leur prescrit pas même de siéger de préférence dans l'une ou l'autre des Provinces ; et de fait ils ont siégé dans chacune d'elles. Il est évident qu'ils ne sont pas autorisés à prendre connaissance des lois particulières d'aucune de ces Provinces.

Enfin si le droit privé d'un État ou d'une colonie pouvait prévaloir dans une matière de cette nature, il en résulterait des

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\* 14 Geo. 3, c. 83, 1774, ou Statuts Refondus du Canada, sec. 8e, page 10 et suiv. Forsyth, Constitutional Law, pp. 2, 11, 16, 18, 19, 21.

injustices innombrables, lorsque les deux colonies intéressées auraient des règles de droit différentes, comme dans l'espèce actuelle.

Le Code de Procédure Civile de la Province de Québec, il est vrai, pose comme règle que la majorité des arbitres lie la minorité, mais il ne parle que des arbitrages privés sur compromis ou ordres des tribunaux. Il ne contient aucune disposition sur les arbitrages autorisés par des statuts spéciaux de la Législature fédérale ou locale; et aucun précédent ne peut être invoqué, consacrant le principe qu'en matière d'arbitrage public la règle en Bas Canada est la même qu'en matière d'arbitrage privé. La Province de Québec n'a pas de droit commun sur le sujet.

Il y existe un droit public consacré par la pratique de sa Législature. Dans tous ses statuts ordonnant la nomination d'arbitres ou commissaires, le pouvoir a été donné d'une manière expresse et invariable à la majorité des arbitres de juger. Ainsi à propos des expropriations faites sous l'empire de l'Acte Municipal de 1860,\* le législateur déclare que les évaluateurs municipaux ou deux d'entr'eux (ils sont au nombre de trois) pourront déterminer l'indemnité. Il en est de même des expropriations dans la Cité de Montréal; deux des trois Commissaires ont le droit de décider.† A l'égard de la codification de nos lois civiles, les Statuts Refondus du Bas Canada ‡ déclarent que le rapport de deux des trois Codificateurs suffira. Même au sujet des arbitrages dans les cours des commissaires pour la décision sommaire des petites causes dans chaque paroisse, le statut a le soin de dire que la majorité des trois arbitres décidera.§ Tous ces exemples, auxquels on pourrait en ajouter un grand nombre d'autres, ne démontrent-ils pas que la Législature de la Province de Québec a consacré le principe qu'en matière d'arbitrage public l'unanimité est requise, à moins qu'il en soit ordonné autrement?

Il y a plus. Dans la Province d'Ontario, il ne paraît pas que la prétendue règle du droit commun anglais ait été adoptée par sa propre Législature. Qu'on ouvre ses Statuts Refondus, et l'on verra que dans tous les cas où une ordonnance autorise un arbitrage public, elle déclare formellement que le vote de la majorité l'emportera. Ainsi la 8e Vict. c. 20, s. 5, à propos des arbi-

\* 23 Vict. c. 61, S. 50.

† 27-28 Vict. c. 60, s. 13.

‡ C. 2 Sect. 16.

§ 7 Vict. c. 19, s. 17.

trages par les trois inspecteurs de clôtures, dit que "the fence viewers, or any two of them," décideront. L'Acte Municipal du Haut Canada,\* tel qu' amendé par le chapitre 26 de ses Statuts locaux de 1869, veut pareillement que les arbitrages qu'il permet puissent être déterminés par la majorité des arbitres. On trouve une semblable disposition dans le statut concernant les Compagnies à fonds social des Chemins, *Joint Stock Road Companies*: † "and any award made by a majority of the said arbitrators shall be final."

Ce n'est pas tout. Il y a sur le sujet un droit public colonial commun au Bas et au Haut Canada, même à toute la Puissance.

Les Statuts Refondus du Canada, c. 28, s. 4, ordonnent que les arbitres officiels, chargés d'estimer les dommages causés par des travaux publics, ou la majorité d'entr'eux jugeront. Pareillement, à l'égard des expropriations par des Compagnies de Chemins de Fer, ‡ et des arbitrages sur applications concurrentes pour patentes ou brevets d'invention. § De semblables clauses se trouvent dans les statuts de la Puissance de 1867 à propos des arbitres officiels || et des évaluateurs des terrains appropriés pour le Chemin de fer Intercolonial. ¶ Nous ne voulons pas prolonger cette liste. Elle est plus que suffisante pour établir que nos Législatures Coloniales n'ont jamais considéré la règle du droit commun anglais comme étant en force en Canada; et, remarquons le en passant, elle fait aussi voir que la clause de l'Acte d'Interprétation, déclarant que quand un acte doit être accompli par plus de deux personnes, la majorité de ces personnes pourra l'accomplir, ne s'applique qu'aux corporations et non aux arbitres ou commissaires non incorporés. Aussi, les divers actes d'incorporation en existence dans le pays sont silencieux à l'égard du pouvoir de la majorité des membres de la corporation de lier la minorité.

Il ne nous reste plus qu'un dernier point à développer pour clore cette étude déjà peut-être trop longue. Existe-il quelque doute dans l'esprit du lecteur sur la nullité de l'Arbitrage Provincial? Se trouve-t-il encore quelques parties de cet im-

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\* Sect. 339, par. 13.

† Stat. Ref. du H. C., c. 70, s. 17.

‡ S. R. du C., c. 66, s. 11, par. 11.

§ Ibid c. 34, s. 15.

|| 31 Vict. c. 12.

¶ 31 Vict. c. 13, § 14.

important débat non comprises ou douteuses. La considération suivante devra dissiper toute incertitude. Il ne faut pas regarder l'acte de l'Amérique Britannique du Nord, 1867, comme un simple statut, ni l'arbitrage qui y est ordonné comme d'intérêt public seulement. Cet acte Impérial doit être vu à la lumière des règles sur les traités entre nations ou États étrangers, et cet arbitrage doit être soumis aux règles du droit international public.

L'Acte de l'Amérique Britannique du Nord, 1867, a tous les caractères d'un traité entre les provinces confédérées, parcequ'elles ont toutes les marques des États confédérés ou unis, et qu'il est de leur intérêt particulier et général qu'elles soient ainsi considérées.

Mais, objectera-t-on, la Puissance du Canada ne forme pas un État souverain. On ne saurait soutenir que le Canada bien qu'il ait aujourd'hui de vastes territoires, sa législature et son gouvernement propres, ses lois civiles et criminelles distinctes de la métropole, son système indépendant de douanes, monnaies et de papier crédit ou national, ses statuts particuliers de milice intérieure et de protection de ses côtes maritimes, ses agents d'immigration à l'étranger, sa représentation dans les expositions internationales, et qu'il exerce plusieurs autres droits des nations souveraines, même à l'encontre des lois ordinaires de la Grande Bretagne, on ne saurait soutenir, disons-nous, que le Canada soit un État ou un pouvoir indépendant et souverain.

Néanmoins ses actes devront être soumis aux règles du droit international, tant qu'ils auront lieu dans les limites de sa constitution. Il semble qu'on doit considérer la Puissance du Canada comme un de ces États que les auteurs appellent mi-souverains.

"Un Etat," dit Esbach,\* "n'est plus que mi-souverain, quand un autre a acquis contractuellement le droit de s'immiscer dans l'exercice de son gouvernement ou de le déterminer dans une partie de ses actes intérieurs ou extérieurs. Pareille restriction affecte surtout la souveraineté extérieure, et le degré s'en détermine par les clauses du traité qui a créé cette semi-dépendance. Un Etat, quoique mi-souverain, n'en est pas moins un Etat : il continue à pouvoir invoquer directement les principes du droit international, et conserve le droit de traiter, comme puissance indépendante avec les autres Etats, sur tous les points autres que ceux sur lesquels il est tenu à subordination."

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\* Introduction à l'Etude du Droit, p. 65.

"The mere fact," dit Halleck,\* "of dependence, however, does not prevent a State from being regarded in international law as a separate and distinct sovereignty, capable of enjoying the rights and incurring the obligations incident to that condition. Much more importance is attached to the nature and character of its connexion with other States and the degree and extent of its dependence."

Wheaton † : "States, which are thus dependent on other States in respect to the exercise of certain rights essential to the perfect external sovereignty, have been termed semi-sovereign States."

Heffter ‡ : "Il faut convenir que l'idée d'une mi-souveraineté est très vague et présente même une espèce de contre-sens, le mot de souveraineté excluant toute dépendance d'une puissance étrangère. Il n'est pas même possible de ramener à un type unique les restrictions nombreuses dont cette dernière est susceptible. Néanmoins, comme le terme a une signification double : souveraineté extérieure par rapport aux puissances étrangères, souveraineté intérieure de l'État ; il est permis de parler d'un État mi-souverain pour indiquer la nature bâtarde d'un corps politique condamné à subir dans ses rapports extérieurs l'impulsion d'une puissance étrangère."

Le Canada, avec ses privilèges et ses pouvoirs actuels, ne doit donc plus être considéré comme une simple colonie, mais comme un État aux yeux du droit des gens ou international ; et ses récents procédés ou lois sur la question des Pêcheries et celle de la navigation du St. Laurent, reconnus par les Etats-Unis comme étant du domaine international, démontrent que cette situation politique est un fait accompli.

Sous le système de l'Union qui nous régissait avant la constitution actuelle, voici comment notre autonomie était considérée. L'opinion que nous allons invoquer doit faire autorité ; car elle émane d'une illustration de la science et d'un esprit impartial, n'ayant aucun intérêt à nos débats.

"Les colonies," dit le Professeur Bluntschli,|| "quoique dépendant politiquement de la métropole, peuvent cependant avoir un certain degré d'indépendance et faire certains actes rentrant dans le domaine du droit international. Le grand éloignement

\* Int. Law, p. 65.

† Int. Law, § 34.

‡ Droit International, p. 37.

§ Klüber, Droit des Gens, § 24.

|| Traité du Droit International, p. 87.

des Colonies d'outre-mer rend souvent désirable, dans l'intérêt même de celles-ci, qu'elles aient un gouvernement spécial et jouissent d'une représentation distincte. Quoique, à l'origine, la mère-patrie soit seule le siège de la souveraineté, le développement de la colonie exige une plus grande liberté de mouvements. C'est par ce moyen que les colonies arrivent à avoir une vie propre et à s'ériger même en États souverains. L'histoire de l'Amérique est très instructive sous ce rapport. Comme exemple de bonne politique coloniale, nous pouvons citer la conduite actuelle de l'Angleterre depuis les réformes de Lord Durham au Canada en 1836."

La diplomatie a de fait reconnu que l'Acte d'Union de 1840 donnait au Canada les droits de la souveraineté sur toutes choses, excepté certaines matières spéciales. En 1841, le Procureur Général des États-Unis, l'Hon. H. S. Legare, en parlant du pouvoir des États de l'Union de faire des traités d'extradition, s'exprimait ainsi: "I am of opinion that it is necessary to refer the whole matter to Congress and submit to its wisdom the propriety of passing an act to authorize such of the States as may choose to make arrangements *with the Government of Canada or any other foreign State* for the mutual extradition of fugitives.\*

Le Gouvernement de cette Province a d'ailleurs toujours été considéré comme mi-souverain, même sous la Constitution de 1791: "The Legislature of Lower Canada," disaient en 1838 le Procureur-Général Sir John Campbell et le Soliciteur-Général Sir R. M. Rolfe, "as constituted by 31 Geo. 3, c. 31, had conferred upon it a *general sovereign legislative power within the province*." †

Aussi le Gouverneur du Canada et les Lieutenants-Gouverneurs des Provinces-Confédérées ou unies ne sont pas de simples officiers publics. Suivant l'expression significative de Lord Mansfield, "the Governor is in the nature of a viceroy." ‡

L'histoire des nations nous fournit une dernière preuve sur ce point. En référant à Esbach,§ on verra qu'il a existé et qu'il existe encore plusieurs États qui, étant dans des conditions de dépendance plus onéreuses et restrictives que le Canada, sont néanmoins appelés mi-souverains. L'exemple le plus frappant

\* 3 Attorney General's Opinions, 661. † Forsyth, *ibid.* 466.

‡ *Fabrigas v. Mostyn*, 20 State Tr. 181.

§ Int. à l'Étude du Droit, p. 65.

est peut-être celui que nous offre la ci-devant République des Iles Ioniennes en vertu du traité de Paris du 5 Novembre, 1815. Comme dit Wheaton, \* “in practice, the United States of the Ionian Islands are not only constantly obedient to the commands of the protecting power, but they are governed *as a British Colony* by a Lord High Commissioner named by the British Crown.”

“Thus,” disaient, en 1855, les officiers en loi de la Couronne, Sir John Harding, Sir A. E. Cockburn et Sir Richard Bethell, “the Ionian State is, as regards its foreign relations, dependent on this country, while with reference to its internal government it remains an independant State.” †

Nonobstant toutes les restrictions de sa Constitution, pour nous servir des termes de Wheaton, ‡ “in such a manner as materially to abridge both its internal and external sovereignty,” la République des Iles Ioniennes était regardée par les nations comme un Etat mi-souverain. §

Les publicistes vont jusqu'à maintenir que les tribus sauvages soumises à un pouvoir étranger doivent être traitées comme des Etats mi-souverains, “The political relation of the Indian nations on this continent towards the United States,” dit encore Wheaton, || “is that of semi-sovereign States, under the exclusive protectorate of another power.”

Quoiqu'il en soit, que le Canada soit ou non soumis aux règles du droit international dans ses rapports avec les nations étrangères, la situation politique ou internationale des Provinces confédérées vis-à-vis d'elles mêmes n'en serait nullement affectée. Quand bien même la Puissance serait demain déclarée indépendante et souveraine, cette circonstance n'altérerait que la position politique et internationale du gouvernement fédéral vis-à-vis des autres nations, et non les relations des provinces confédérées entre elles, qui ne changeraient pas d'un iota. Nous le répétons; quand bien même l'Acte de l'Amérique Britannique du Nord, 1867, ne serait pas un acte de droit international vis-à-vis du monde entier, il a tous les caractères et les effets d'un traité entre les provinces confédérées.

Il suffit de se rappeler que cet acte est le fruit des conférences de Québec entre ces mêmes provinces et de leur requête respective au Parlement de la Grande Bretagne, que chacune de ses clauses

\* § 36.

† Forsyth, *ibid.*, 475.

‡ § 36.

§ *Ibid.*

|| § 33.

n'y a été adoptée qu'avec l'assentiment de leurs délégués à Londres ; il suffit, disons-nous, de constater que cet acte Impérial pourvoit à l'existence séparée de toutes ces colonies avec leurs propres lois, leurs biens particuliers, et même leurs législatures locales, sujets aux restrictions créées en faveur du pouvoir général ou fédéral et de la Couronne Anglaise ; et l'on se convaincra que l'intervention du Parlement Britannique n'a eu lieu que pour mettre à effet ces conventions intercoloniales. Vis-à-vis des provinces confédérées et entr-elles, l'acte de l'Amérique Britannique du Nord, 1867, a tous les caractères et doit avoir tous les effets d'un traité ou d'une convention internationale.

On peut assimiler les Provinces Britanniques aux Etats de l'Union Américaine, qui séparément ne sont pas des états souverains. Or, ces Etats sont régis entr-eux par les règles du droit international public. "Thus," dit Woolsey, \* "the States of this Union, in the view of our science, are not sovereign, for they cannot exercise the treaty making power, nor that of making war and peace, nor that of sending ambassadors to foreign courts. They can only exercise towards foreign nations those private rights which may pertain to any individual or association. *It is to be observed, however, that between states of qualified sovereignty, the law of nations has application so far as it is not shut out by restrictions upon their power.*" † "The question arises," disait le juge Barbour dans l'affaire de *Marlatt v. Silk*, ‡ "under, and is to be decided by, a compact between two States," (c'est à dire, deux Etats de l'Union Américaine) "where, therefore, the rule of decision is not to be collected from the decisions of either State, *but is one, as we may so speak, of an international character.*"

"But if a State," dit encore Halleck, § "has lost these qualities (of independence) by such union with others, either by becoming subject to their will or by creating a new national power, of which it is only a component part, it can no longer be regarded in the eye of international law, as a sovereign state, *although it may retain many of its sovereign rights with respect to its confederates.*"

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\* Int. Law, p. 52, § 37.

† Voir aussi *The State of Rhode Island v. The State of Massachusetts*, 12 Peters, 657, 738, 743, Baldwin, J. ; *The Bank of Augusta v. Earle*, 13 Peters, 590, per Taney, J.

‡ 11 Peters, 22.

§ Int. Law, p. 68.



Que faut-il de plus à l'arbitrage Provincial pour lui donner le caractère d'un arbitrage international public ? Son objet intéresse deux gouvernements légitimes et reconnus par les deux parties litigantes. Il est impossible, à notre humble avis, de ne pas appliquer à cet arbitrage les règles du droit international public.

Et quand bien même le Canada et ses provinces ne seraient pas des Etats, il est clair que l'arbitrage Provincial ne peut être soumis à aucun droit particulier ; il faudra donc lui appliquer le droit naturel, qui est la base du droit international public.

La matière de l'arbitrage international n'est point ou est légèrement touchée dans les productions de la science qui nous sont parvenues. Ce mode admirable de régler les différends entre les nations, assez fréquent dans l'antiquité et au moyen âge, est depuis longtemps presque tombé en désuétude. Il appartenait à notre siècle de le faire revivre ; ce qui a fait dire à Mr. le Professeur Lieber : " Cette institution appartient aux temps modernes, ou plutôt à l'époque actuelle." \*

L'éminent professeur italien Fiore, dans son nouveau Droit International Public, en dit néanmoins quelque chose ; et ce qu'il en dit nous semble dans le sens que nous soutenons. " Pour," dit-il, † " qu'un jugement arbitral soit possible, il est nécessaire qu'entre les deux parties intervienne un compromis par lequel les parties s'obligeraient volontairement à se soumettre au jugement de personnes choisies et établiraient le mode de procéder et la limite du pouvoir accordé aux arbitres."

On peut citer le dictum de Heffter comme contraire à nos prétentions. " En cas de désaccord entr-eux," dit-il, ‡ " l'avis de la majorité doit prévaloir conformément aux principes de la procédure ordinaire."

Il est difficile de comprendre comment on peut invoquer ces principes, puisqu'ils ne reposent pas sur la nature des choses et le droit naturel. Les règles de la procédure ordinaire d'un Etat sont trop variées et souvent trop opposées à la procédure des autres pays, pour pouvoir s'appliquer aux délibérations internationales. Cette proposition est si vraie qu'elle est reconnue par Heffter lui-même. " Ce droit de libre examen," dit-il, § au titre de *Pratique des Congrès*, " ne cessait naturellement pas non

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\* Revue de Droit International, Vol. 2, page 402.

† Dr. Int., vol. 2, p. 206.

‡ Dr. Int. p. 207.

§ Id. p. 499.

plus dans le cours des négociations mêmes. Chaque puissance restait indépendante dans ses opinions et dans ses déclarations; elle se décidait par la majorité des voix.<sup>7</sup>

Si l'unanimité est requise dans les Congrès comme l'affirme Heffter, la même règle doit prévaloir dans les procédures des arbitres internationaux.

D'ailleurs, si la discussion ou l'opinion des auteurs sur la question fait défaut, les principes sont clairs et précis et y suppléent.

D'après ces principes, les traités ou les conventions pour arbitrage international font loi, mais non au delà de leur contenu; ils sont considérés comme des contrats et sont soumis aux règles d'interprétation de ces derniers.\* Or ces règles telles que posées par Vattel,<sup>†</sup> sont les. Qu'il n'est pas permis d'interpréter ce qui n'a pas besoin d'interprétation: 2o. Que si l'un ou l'autre des contractants n'est en droit d'interpréter l'acte à son gré: 3o. Que leur interprétation doit être fondée sur la droite raison et sur la loi naturelle et non pas sur les lois particulières de l'un des contractants: 4o. Qu'il faut, enfin, toujours rechercher l'intention des parties.

Dans l'espèce actuelle, il ne peut exister d'ambiguïté. Les deux provinces de Québec et d'Ontario déclarent soumettre le partage de leur actif et passif à la décision de trois arbitres. Comment en face d'un langage si net et en présence des faits et des circonstances, peut-on raisonnablement supposer qu'elles ont voulu le soumettre à la décision de deux arbitres?

Enfin l'histoire des traités, que l'on peut appeler la jurisprudence internationale, vient à l'appui de nos prétentions. On peut bien citer quelques rares exemples où des différends furent soumis à trois ou plus de trois arbitres, sans déclarer que la majorité d'entre eux déciderait; mais on ne trouvera pas un seul cas où la sentence arbitrale ait alors été rendue par la majorité. En sus, il existe une foule d'espèces où le pouvoir de juger a été donné à la majorité des arbitres (au nombre de trois ou plus) de la manière la plus expresse. Ainsi par le traité de 1795 entre les États-Unis et l'Espagne à propos des dommages causés par la prise illégale des navires, il est convenu que *the award of the said*

\* Gardiner's Inst.: 14 Peters, 11: 7 Id. 86-88: 8 Wheaton, 490: Wheaton, Int. Law, § 287: Vattel, liv. 2, ch. 17: Butherford's Int. Law, b. II, ch. 7: Grotius, *De Jur. Bel. ac Pac.*, lib. II, ch. 7.

† T. 2, p. 48 *et* *suiv.*

*Commissioners or any two of them, sera finale.* Il en est de même du traité de 1794 entre les Etats-Unis et la Grande Bretagne. L'article 6 déclare: *and all decisions shall be made by the majority of the voices of the Commissioners.* L'Acte de la Diète Germanique du 30 octobre, 1834, établit une juridiction arbitrale chargée de décider les différends entre les Etats confédérés; et l'article 6 porte entr'autres choses: "The judges—arbitrators, including the umpire, shall decide *by a majority of voices, the matter in controversy.*" \* La déclaration du 14 Novembre, 1842, entre la Grande Bretagne et la France renvoie l'estimation de certaines réclamations "à des commissaires-liquidateurs, l'un anglais, l'autre français, *lesquels seront départagés au besoin par un commissaire sur—arbitre prussien.*" La commission nommée en vertu de l'article 16 du Traité de Paris de 1856 est chargée d'arrêter les droits qui y sont spécifiés à la majorité des voix. Les traités de la Grande Bretagne avec la République d'Honduras (1859) et celle du Nicaragua (1860) donnent plein pouvoir aux deux arbitres de ces deux gouvernements d'en nommer un troisième, lequel sera *an arbitrator or umpire in any case or cases in which they may differ in opinion.* Même dans le récent traité proposé en 1869 entre la Grande Bretagne et les Etats-Unis pour le règlement de la question de l'*Alabama* par quatre arbitres, il est expressément stipulé que la majorité d'entr'eux pourra décider.† On trouve de semblables stipulations dans un grand nombre d'autres traités et, en particulier, celui de 1802 entre les Etats-Unis et l'Espagne et celui de 1819 entre les mêmes nations.

A-t-on besoin d'une autorité pour établir que tous ces exemples font loi? La voici: "Although," dit Halleck,‡ "one or two treaties, varying from the general usage and custom of nations, cannot alter the pre-existing international law, *yet an almost perpetual succession of treaties, establishing a perpetual rule, will go very far toward proving what that law is upon a disputed point.*"

Tous ces précédents sont une démonstration complète qu'aux yeux du droit des gens, les arbitrages entre Etats souverains ou dépendants, n'ont pas d'autres règles que celles qui sont arrêtées par la convention, et que pour que la majorité ait le pouvoir de

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\* Wheaton, sec. 54.

† Revue de Droit International, vol. 1er. p. 450.

‡ International Law, p. 60.

juger le différend, il faut de toute nécessité que ce pouvoir lui soit expressément accordé par le compromis.

En résumé à notre humble avis, la sentence arbitrale des honorables Gray et Macpherson est nulle :

10. Parceque la cause n'a pas été totalement instruite devant les trois arbitres, et qu'elle n'était pas en état d'être jugée lors de la résignation de l'hon. Juge Day.

20. Parceque la dite sentence ne pouvait être prononcée que par tous les arbitres à l'unanimité, et non à la majorité des voix seulement.

D. GIROUARD.

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L'article qui précède indique suffisamment notre intention de discuter uniquement la validité de la sentence des honorables arbitres, au point de vue de leur juridiction. Nous n'avons pas parlé du mérite du partage, s'il doit se faire suivant les principes *de la société*, comme l'a maintenu l'honorable Juge Day, ou suivant ceux *des associations politiques*, comme l'a décidé la majorité de ses collègues. L'examen de cette dernière question touche de trop près aux intérêts politiques pour être l'objet d'une revue légale. Qu'il nous soit permis de remarquer que s'il est admis que la procédure de cet arbitrage doit être soumise au droit international, le mérite de l'arbitrage même doit être décidé suivant les principes de ce droit.

D. G.

## MY FIRST JURY TRIAL.

Some years have now elapsed since my first appearance as counsel before a special jury. An anxious and eventful day in my professional life. I remember it well, and some of its incidents may teach a lesson to younger lawyers, to those who may come after me, not so much on account of any particular skill or ability displayed on that occasion, as to show that a lawyer must never lose confidence in himself or faith in his cause during the struggle, notwithstanding the most desperate and discouraging vicissitudes of a trial.

I was still a very young man, and had been about three years at the bar. I was working onward amidst the rivalries and contentions of my profession. My practice was increasing, and I was beginning to acquire confidence in myself, and to indulge hopes of more than ordinary success in the career I had chosen. Many eyes, some friendly, some anxious, were upon me; my burden was not light. I had many duties to perform, heavy and sacred claims to meet; and not only as regarded myself but also in reference to others, much depended upon my exertions and success. My cases heretofore belonged to the class of those which are decided, both as to law and fact, by the judges, without the intervention of verdicts by juries. At length, however, I was called upon to encounter the ordeal of my first jury trial before a special jury. Every lawyer placed in a similar position knows what that ordeal is, or was to him, and mine certainly was no exception to the generality. I have had some hard struggles since, and have passed through some rough scenes, but none that tried me like this. It was a trial not only to my client but also to me. The case was one of importance, involving a considerable sum of money, and presenting difficult questions of fact and delicate points of law. My client was not a rich man, but I believed then, and I believe still, that he was thoroughly honest, and that he had told me the truth, the whole truth, and nothing but the truth. This was a tower of strength to us both. His whole fortune, if I may so call it, depended upon success, but above all his character for truthfulness and integrity was at stake. He was a nervous and anxious man, and had once or

twice gently hinted that if agreeable to me he would employ or allow me to employ additional counsel. He was evidently of opinion that his case would not be the worse of some additional assistance; he thought, in fact, that his prospects of success would have been better. But I was young and self-confident; I wished to fight the battle alone. Besides, I had the evidence so well prepared, and was so entirely master of the facts, that I believed additional counsel would only embarrass me. I had looked carefully into the law, collated the authorities, and examined the decisions bearing on my case, and thus armed I was determined to take the field alone. I have often thought since that in this view of my powers, and of my obligation to my client, I acted very imprudently, and that both he and I might have been ruined had it not been for good fortune.

My client had for years been insured in the office of the defendants against loss and damage by fire, upon furniture, wearing apparel, &c. No questions were asked, no valuation or examination of his property ever made, the premiums duly paid, and policies issued. By the last policy issued the Insurance company insured plaintiff in consideration of the premiums received against loss and damage from — to — for \$ — in personal property in —.

By fire, purely accidental, happening between three and four o'clock in the morning, the premises occupied by my client were burnt, gutted and destroyed. After preliminary valuation by assessors of articles of which some remains could be found, my client, upon a printed form given him by the company made up and gave, under oath, his loss in detail. Failing to obtain a settlement, he, after many attempts and much delay vexatious to a person wholly ruined, brought his action.

The company resisted the claim on several grounds, whereof the principal were that the plaintiff had made a false statement in claiming for a total loss, and a fraudulent claim in demanding double the amount of his loss. Their lawyers were men of long experience and eminent position at the Bar. They had both attained to the rank of Queen's Counsel and were a credit to the profession, in which they were among the foremost. After issue joined, a motion was made for an order that the case should be tried by a special jury. The preliminary proceedings having been taken, the day was fixed for the trial, for striking, summoning the jury, &c., &c. The day of trial came and found me fully

prepared; as I said before, I was alone and new to this description of professional conflict which required so much judgment, readiness, and self-possession. Although determined to do my utmost I was very anxious. Some gentlemen whom I knew well were to be on the jury, and all of them were eminent merchants in the city. Some of them willing to encourage me had entrusted me with cases in the Circuit; while eager to do my best for my client I was far from indifferent about my own reputation, and I was impressed with the erroneous belief that everything depended upon the exhibition I was about to make of my professional skill and capacity. How much in the outset of a career we often underrate or exaggerate the effects of our *debut*. No doubt that it is or may be in the highest degree important; it starts us well, but the goal is not won, and it must be followed up by labour, steadiness, perseverance and attention to the business entrusted to our care. The young lawyer may in his first effort fail, but how often do we see that this very failure only stimulates to new and more resolute exertions. In most cases, with perseverance and a heart in his work, the day of triumph will come, and when it does beware of the man whose debut was a failure. The strife and the struggle have sharpened his intellect, hardened his nerves, and taught him consummate skill in the use of his weapons.

The time appointed for the trial was ten o'clock, and I took my seat immediately in rear of the Queen's Counsel table, a few minutes before that hour. My papers were before me, my books on each side, a goodly row, for I was armed to the teeth. The trial excited considerable interest, and already the spectators began to assemble. The clerk was in his seat, and the criers were in attendance. Then came the defendant's counsel—wily and experienced men. They lounged in carelessly and nodded to me patronisingly as they passed to the Queen's Counsel table, where they took their seats. Shortly after some of the jury arrived, and then others followed, and soon the Court was pretty full. Precisely at ten the judge took his seat, and as he did so the crier called silence, and the counsel rose to make their bows. It was then that I felt the full weight of my responsibility. My client was at my side, and nervously anxious. The judge was a large impressive-looking man, about fifty years of age, with a careless impassive expression of countenance, and wore the appearance of one long accustomed to such scenes. How unconcerned they look these judges, whose words and decisions affect so much

the fortunes and happiness of thousands who seek justice at their hands. He had always been very kind, and had often spoken many an encouraging word to me in his off-hand easy way, but he had a clear head and prompt judgment, and understood thoroughly all the arts and wiles of our profession. I knew his look of indifference and almost weariness took in and fathomed all that was going on. I felt this now, and when his cold and steady eye met mine, it seemed to say, or I thought it did, "You have a hard struggle before you, but faint heart won't do here." He enquired of the clerk if the parties were ready to proceed with the case. When answered in the affirmative, he ordered them to be called. To the plaintiff's name I answered firmly "I appear"; my voice seemed to ring through the whole court house. The defendant's counsel nodded carelessly to the clerk when their client's name was called. The names of jurors being called over, and they sworn, the judge said, rather impatiently, "Go on, gentlemen; who opens the case?" "I do, your Honor," said I; and I was immediately upon my feet. One of the defendant's counsel, with his head upon his hand, and his elbows on the table, looked round at me carelessly, and then whispered something to his senior, who smiled. A dark mist was now setting in upon my eye and brain, the objects and persons around me were at times receding and then flashing in my face, like things seen moving in the vapours of the early morning. At first I felt as light as a feather, and then as heavy as lead. I did not tremble, but I felt as if I were paralysed. I took up some of my papers. The jury settled themselves in their seats, and seemed fixed in attitudes of critical attention. Some of them I thought even gave me painfully anxious glances out of the corners of their eyes; they looked as if they pitied me. This was all imagination. What they really wanted was to have the matter over and to get away. Before me were these twelve educated intelligent business men. The judge was opposite me, my client by my side, and the audience around me. About ten seconds elapsed from the time I rose to my first utterance, "May it please the court, and you, gentlemen of the jury," yet it seemed a century; I had lived at least ten years in that time. The judge looked impatient, and seemed to say, Go on, sir, go on. I felt a shiver running along my nerves, and then all the blood in my veins rushed tumultuously to my brain. I felt as if every man in the room, even to the judge, was my mortal enemy, and ready to break forth in a roar of laughter at my



position. But, thank God, my young nerves were strong; they did not give way. I began my statement of the case with a deliberation which must have impressed my hearers with the conviction that I was insane. But I had mastered the facts thoroughly; they were impressed on my memory as if engraven in adamant; my blood slowly warmed, and the equilibrium of the circulation was gradually restored. I rapidly forgot myself and all else, except the facts of the case. I spoke nearly an hour, and laid the facts clearly before the jury. Though modest and so timid then, the judge told me in after years that I made a very creditable effort. When I closed I had thoroughly recovered my self-possession and I felt sure of success.

I had not, however, much time to waste in glowing anticipations, or in admiration of my efforts. I had scarcely taken my seat when the judge, never a very patient man, growled out, "Well sir, your first witness, go on." I proceeded to adduce my evidence and notwithstanding severe and browbeating cross-examinations I established by no less than ten witnesses all the essential averments of my declaration. The policy of insurance, the fire on the morning in question, the loss and value of the furniture and wearing apparel, and my application in due form to be paid. Thus supported, the case seemed impregnable, and both my client and myself were confident of a verdict in our favour. I was really at a loss to conceive or to understand what my opponents had, or could have, to say, but there were breakers ahead; I did not perceive them then, but I could now; I received a lesson then, I am not likely to forget. I soon saw where I was drifting, as one of the opposite counsel carelessly rose and bowing quietly to the judge and jury he began in a conversational style to state his few choice words, to him mere platitudes; he was very complimentary to his young friend, who had certainly given proof of great care, industry and promising ability. He had, moreover, made out a very plausible case for the jury, "But," he added, with a deferential look at the Bench and a confidential glance at the jury, "these things are well understood in courts of justice; gentlemen, men of intelligence like yourselves and I may add perhaps, the honorable and learned judge who presided over this court, will require something more before this case is disposed of. It will be our painful duty to present a different, a very different picture of this case to your consideration; I say painful, gentlemen, because our clients always deeply

regret when they feel obliged to resist a claim on account of fraud, and fraud not only in its ordinary sense, but falsehood and fraudulent statements of the grossest character." In this strain he proceeded to show that my client was strongly suspected of having set fire to the premises. Grave suspicions were prevalent, and in fact, he might venture to add, that proof he believed existed, but these things were always difficult to establish and detection and conviction were almost impossible; besides, he said, that ground had been abandoned because there was indeed no wish to press too hard upon the plaintiff. They would, however, prove that if he was not guilty of a crime he had anticipated one and had removed a certain portion of his furniture before what he would call, the accident, had occurred. It was even very doubtful if any of the wearing apparel had been destroyed. It would also be made clear to the court and jury that the furniture destroyed by the fire was almost worthless. In any view of the matter it would appear from the evidence that the claim was accompanied by false statement and was of the most fraudulent character, and that the only verdict which could be rendered in the case would be one sending the plaintiff out of the court, branded, he was sorry to say, as a man guilty of the grossest fraud.

This address had obviously made a great impression on the jury, and I confess that a feeling of great uneasiness came over my mind at the cool confident tone of my adversary's speech. He had closed with the remark that the evidence they were about to adduce would relieve the court and jury of all embarrassment in disposing of the case. The defendant's counsel then proceeded to adduce evidence in support of the defence. They examined several witnesses, and their testimony was strong, very strong against the plaintiff. After establishing in a general way that his loss had been very trifling, they produced a witness who had acted as one of the appraisers on behalf of the Company after the fire. He was a respectable intelligent-looking man, and had given the premises and every article of furniture in the house, a very particular examination. When I saw him step into the witness box after the evidence which had been adduced, I felt as if my case was likely to receive a finishing stroke. He spoke strongly and decisively, and among other statements was one which ruined my case. After describing the condition and appearance of the house inside, and shewing that the chest of drawers was empty, but uninjured; that no carpets had been destroyed, and appar-

ently no household furniture or wearing apparel were lost or damaged, he proceeded to show that no hair mattresses were there at the time of the fire. He proceeded to show the jury a quantity of manilla found there, and assured these gentlemen that the idea of there being any hair mattresses was preposterous; that he had taken this bundle of manilla from the mattresses which plaintiff pretended were of hair, but there was no hair in them. To all appearance my case was lost; my client was speechless with dismay. I raised my hand to my head and felt that my temples were throbbing as if a high fever was on me. I looked up to the judge whose look seemed to say "your case is in a very critical position, and the chances are all against you." What was passing in his mind I don't know, but his eyes conveyed the meaning to me.

I rose to cross-examine this formidable witness. I first asked him how old he was and requested him to favour the court and jury with his exact age, if possible. He raised his hand to his forehead and reflecting a moment he answered that he was as near as he could attest forty years of age. I then asked him where he was born and a variety of other questions not very important but calculated to call off attention from his evidence. I called upon the clerk to be very particular in taking down the witness's exact words. At length he became impatient and said he did not see what all this had to do with the case. I reminded him that this was none of his particular business and requested him to answer my questions without any evasion. I then required him to say how often he had acted as appraiser for the defendants or for any other insurance company. He replied that he had acted once before for defendants. He was then asked to say whether his evidence on one occasion had not given rise to some very unpleasant circumstances. He became indignant and refused to answer. I then said "Very well, sir, I will not press you on that point as I perceive you do not relish being interrogated in regard to these matters." He replied that I was mistaken but he did not wish to be asked questions that had no sense. "Very well, sir," I said, "as you please, you probably know better than I do, what you should or should not answer touching these matters. You have no objection, I presume, to take your bundle of manilla, taken from the plaintiff's premises, to open it and show it to each of the jury." He did so, and one of the jury looking at it closely, said: "why, the greater portion of your

sample is horse hair." Upon this fact being verified, there was considerable laughter among the audience, in which the jury joined. The witness stammered out some explanations which caused the jury to smile, and my adversaries began to look rather blank. I saw my advantage and said to the witness: "This will do, sir, please to step into the box," which he did, much confused. I just put him a few more staggering questions touching the other articles, &c., which he answered in a most unsatisfactory manner. I then said, "I have done with you and you may retire." He had broken down completely, and my cross-examination had given a most favourable turn to my case. I proceeded to adduce evidence in rebuttal, which I had kept in reserve. This new testimony entirely neutralized that of the defendants', and corroborated mine. It was my turn now to address, and I rose to do so with great confidence, my blood was up. I approached a few feet nearer to the jury and began by some severe animadversions on the agent of the company. One of the opposite counsel interposed and called upon the court to put a stop upon these injurious reflections, remarking that they were in no way justified by the evidence and my address was a comment on testimony. The judge intimated that I had better desist from making observations which the proof probably did not warrant. I immediately rejoined that I could quite understand my learned adversaries' apprehensions and would strictly obey the ruling of the court. I then went on to answer the opening speech of the defendants' counsel, and in doing so employed all the bitterness and sarcasm I could command. Again I was interrupted by one of the opposite lawyers who characterized my remarks as unwarrantable and outrageous and asked the court to interpose; again the judge requested me to confine my observations to the record and the evidence. I replied that as my learned friends seemed very susceptible, not to say sensitive, and were no doubt and justly very nervous about the turn the defence had taken I would spare their feelings, which I professed thoroughly to understand and would cheerfully obey his Honor's ruling. I then commented on the evidence at great length and with some vehemence. In the course of my remarks I think I pretty effectually demolished all the testimony brought against my case, and presented a very favourable view of my own evidence. The jury seemed to go with me, at least to listen with marked attention, and I sat down with a feeling of considerable confidence that my client would obtain a ver-

dict or if he lost it the fault was not mine. As the hour was now late the judge said he would adjourn the court till the following morning when the trial would be resumed. I felt now, that much, very much depended on the judge's charge, and neither I nor my client slept much that night. Precisely at ten o'clock the next day, the judge took his seat on the Bench and proceeded to deliver his charge; he told the jury that the points in the case were few; that it was entirely a question of evidence. The plaintiff was entitled, beyond all doubt, to compensation; it could not be less than a certain amount which he named, and it might be as much more as, in their judgment, would indemnify him.

The jury retired and in a short time brought in a verdict for my client for the full amount of his claim, less some \$100. I had won the day, and my adversaries were among the first to acknowledge being fairly beaten. But my troubles did not end here. Having obtained a verdict in my client's favour, the next thing was to secure a judgment for the amount upon that verdict. In this I failed, and upon a small and purely technical point, my action was dismissed with all the costs against my client. It would be useless to attempt to describe my annoyance or the despair of my client. The verdict of the jury had cleared his conduct from all suspicion of fraud, and vindicated his character completely, but his lawyer, from a want of skill, or a want of attention, or technical knowledge of his profession, had ruined him. The costs were enormous and my client was a beggar. For me the position was worse than if the verdict of the jury had been against the plaintiff. I was very much put out by the lamentations of my client, and sorely annoyed by the remarks of some of my professional friends, who were anxious to know how I came to lose my case. Even some of my friends on the jury expressed to me their regret that so good a case had met with such a fate at the hands of the court, that it was altogether too bad. I of course cursed the judge, who had dismissed my action, and, in fact, all judges I could think of by name. But it would not do. In the majority of cases, people who are not directly interested in the decisions of the courts, and even many who are, are very slow in taking up the rabid denunciations of lawyers who have lost their cases. It no doubt upon the whole is a very great mistake, and I have long since given it up. It is not wise for a lawyer who is desirous of obtaining justice for his clients—it won't do at all. But to return.

Amidst all the difficulties of my client's position, I did not lose courage. I was determined to appeal to the Queen's Bench, but I had to find security, and after infinite trouble, I succeeded in persuading a friend of my client's to become security. He did so with great reluctance, and prevailed upon another friend to join him. They did not disguise from me their fears that the case would be lost in appeal, but for the sake of their friend they would assist him in again trying his luck. I carried the case to appeal, argued it before that Court with all the earnestness and professional skill I could command. I had the good fortune to make the points in my case clearly intelligible to the tribunal, and the judges, five in number, at once unanimously reversed the judgment of the court below and gave judgment in favor of my client for the full amount of the verdict, with interest and all the costs of each court.

By this time, and owing to some peculiar circumstances not necessary to relate here, this case had attained to a certain notoriety, and therefore it is quite needless to affirm that my satisfaction at winning it before the highest court in the country was complete.

This is another proof, if such were wanting, that with industry, perseverance, confidence in one's case, and a just cause, justice almost always triumphs in the end, sooner or later; and this is the moral of my story.

JOHN A. PERKINS.

## BIBLIOGRAPHY.

*The Magistrates' Act of 1869, Annotated for the use of Magistrates, with Forms, Precedents, and an Introduction to the Law of Evidence.*  
By WM. H. KERR, Esq., Barrister at Law.

The above is the title of a work recently published, and which reflects very great credit on its author, Mr. Kerr, a practitioner of the Montreal Bar. It is to be regarded as a most valuable acquisition to the list of Canadian publications as bearing upon a subject of so much importance to Magistrates and others concerned in the administration of the law. In dealing with his subject, the author has attained the merit of being lucid and concise, whilst at the same time he has given additional importance to his work by the citation of numerous authorities. The research and application necessary for the proper application of these authorities can hardly be estimated at its proper value, and this suffices to commend the work to the attention not only of Magistrates, but of professional men.

In the first part of it, we find an exposition of the office of a Justice of the Peace; how appointed; the nature of his duties; jurisdiction as to locality; jurisdiction generally; and other matters affecting the exercise of that jurisdiction. Then follows under the heading "Evidence before Justices," a most valuable compilation of rules of evidence, in a condensed form, but sufficiently comprehensive to serve as a valuable guide to Magistrates upon a branch of law which the great majority of them have not the opportunity of studying from the want of works relating to the law of evidence. Following this is a commentary upon the jurisdiction of the Court of Quarter Sessions, showing what offences are triable before that Court, and will subserve the purpose of instructing Magistrates, when committing a party for trial, before what Court the trial should take place.

The author then gives, clause by clause, the Magistrates' Acts of 1869, 32 & 33 Vict., ch. 30, relating to indictable offences, and 32 & 33 Vict., ch. 31, relating to summary convictions and orders, with valuable notes and authorities, showing the jurisprudence which has obtained in England upon the corresponding clauses of the Imperial Acts. We shall presently advert

to Mr. Kerr's annotations on these statutes, desiring simply for the moment to advert to the other portions of the work. The provisions of five other statutes passed by the Dominion Parliament then follow, relating to the prompt and summary administration of criminal justice; the trial and punishment of juvenile offenders; the more speedy trial in certain cases of persons charged with felonies and misdemeanors; and the Act repealing certain enactments respecting criminal law. The Author has added numerous forms, consisting of those appended to the statutes referred to, and also other forms of practical use not to be found in the statutes. The index has been very carefully drawn, and affords a ready reference to every subject treated of,—a matter of considerable importance in a work of the kind. Reverting to the two most important Acts, annotated by Mr. Kerr, relating to the duties of Justices in relation to indictable offences, and to summary conviction and orders, we feel that a more extended notice of this portion of the work should be given. As to the first, 32 & 33 Vict., ch. 30, relating to the duties of Justices in relation to parties charged with indictable offences, it is to be observed, that this statute establishes a uniform rule throughout the whole Dominion, and the copious notes of the author, render this portion of his work of great practical utility to Magistrates in general.

We have now to review Mr. Kerr's annotations of the Act 32 & 33 Vict., ch. 31, relating to summary convictions and orders. It is of the utmost importance to note that this statute is limited in its application by its first section, as also by the repealing Act 32 & 33 Vict., ch. 36, to "any offence or act over which the Parliament of Canada has jurisdiction," and does not extend "to matters relating solely to subjects as to which the Provincial Legislatures have under the British North America Act 1867, exclusive powers of legislation, or to any enactment of any such Legislature for enforcing by fine, penalty, or imprisonment, any law in relation to any such subject as last aforesaid, or to any municipal by-law relating to any offence within the scope of the powers of the municipality."

The author, at page 7, admits that this distinction should be made, as he says:—"It is to be remembered that this work does not treat of the duties of Justices of the Peace under acts of local Legislatures, but is confined solely to a consideration of their duties and powers under the acts of the Parliament of Canada."



Too much prominence cannot be given to this statement, as Magistrates might infer from the remarks of the author in his preface, where he says: "In annotating the sections of *the different statutes now in force*, the writer has striven to collect from the English works everything that seemed likely to be of use," . . . that the work was more comprehensive than it is. Being thus limited in so far as the jurisdiction of Magistrates in summary convictions and orders under Dominion Acts is concerned, it becomes necessary to show the principal points of difference in the law, as affecting the exercise of their jurisdiction under acts of Local Legislatures. The law as respects subjects falling within the jurisdiction of the Legislatures of Quebec and Ontario is still governed by chap. 103, Consolidated Statutes of Canada, and it is important to know that it differs materially from the Dominion Act annotated by Mr. Kerr. For instance, by the latter Act it is enacted that, "In all cases of complaint upon which a Justice or Justices of the Peace may make an order for the payment of money or otherwise, it shall not be necessary that such a complaint be in writing unless it be required to be so by some particular Act or Law, upon which such complaint is framed;" whereas, the very reverse is enacted by sec. 20, chap. 103, C. S. C., which requires that the complaint "shall be in writing and on oath," unless otherwise provided by the particular Act. In the same way, section 24 of the Dominion Act declares that the complaint or information may be made or laid without any oath or affirmation; whereas sec. 24 of chap. 103 expressly requires that they should be made or laid on oath or affirmation.

Then, again, there exists a marked distinction between these two Acts, in relation to the all-important matter of appeals. Sections 65, 66, 67, 68, and 69 of the Dominion Act relating to Appeals, amended by chap. 27 of the Dominion Acts of 1870, are entirely new provisions not to be found in chap. 103, C. S. C. If the Magistrate is acting under a Dominion Act, the provisions of the Amending Act relating to appeals, will apply, which allows an appeal, not "in every case" generally, as might be inferred from the author's remarks at page 387, but "to any person who thinks himself aggrieved by any such conviction or order," thereby limiting the right of appeal to the defendant; the unsuccessful prosecutor having no such right.

But let us suppose a Magistrate in the Province of Quebec or Ontario is exercising his jurisdiction under an Act of the Local

Parliament; how stands the law relating to appeals? Chapter 103, C. S. C., now regulating in both Provinces the exercise of the jurisdiction of Justices in summary convictions and orders under local Acts, contains no provision conferring a right of appeal; but simply contains some enactments as to enforcing convictions or orders appealed from, decided in favour of the Respondents. In Ontario several statutory provisions existed on this subject. By the 2nd Wm. IV., ch. 6, sec. 18, an appeal was conferred in the cases mentioned in the Act determinable by a jury; and the 13 & 14 Vict., ch. 54, conferred a general power of appeal in every case wherein a decision had been rendered by a Justice of the Peace, Mayor, or Police Magistrate in any matter "not being a crime," and such appeal at the request of either party might be determined by a jury to be empanelled for that purpose. This is now the law of Ontario, in virtue of chap. 114, Consolidated Statutes of Upper Canada.

The law of Ontario, applicable to local Acts, differs materially from the laws of England, and from the laws of Quebec in this, that it confers a right of appeal generally in all cases, even to the unsuccessful prosecutor. Archbold, Quarter Sessions, page 85, it is stated: "There is no general statute giving an appeal in all cases against the orders or convictions of Justices out of sessions; but the power of appealing to the Sessions is given by different statutes in particular instances. Saunders on Convictions, pp. 54 and 55, says: "The power of appealing to the sessions is not of general, but of particular right, and exists only in those cases in which it is specially given." This is the law of England.

In the Province of Quebec the same rule prevails. There is no law giving a right of appeal in all cases. It can only exist under particular Acts. The most comprehensive provision is sec. 117, chap. 99, C. S. C., which enacts, "In case any person thinks himself aggrieved by any summary conviction or decision under any of the foregoing criminal Acts," then in case such person complies with its requirements as to notice and entering into a recognizance, he may appeal to the Sessions. The provisions of these criminal Acts so referred to are the following:

1. Chap. 90, sec. 26, 27, 28, 31 and 32. Relating to the offences of importing or manufacturing coin in contravention of this Act, and the uttering of coin other than that mentioned in the Act.
2. Chap. 91, sec. 37. Common assault and battery.

3. Chap. 92, sec. 18, disturbing persons assembled for religious worship; sec. 31, offering shipwreck goods for sale which have been unlawfully taken; sec. 33, dog stealing; sec. 36, 37, 38, 39 and 40, stealing tress, fences, plants in gardens and vegetables, &c.
4. Chap. 93, sec. 25, 26, 27 and 28. Malicious injuries to property.
5. Chap. 95. Lotteries, the making and publishing thereof, and the buying and receiving lottery tickets.
6. Chap. 96. Cruelty to animals.—Constables or peace officers refusing or neglecting to serve any summons or warrant issued under the provisions of that act.

In the above cases an appeal is given; and this shews how different is the law in both Provinces, with reference to appeals from conviction under local Acts. The above observations are made in the interest of Magistrates generally, and to remind them that Mr. Kerr's work does not profess to deal with the law as applicable to their summary jurisdiction in general, but simply in so far as that jurisdiction in relation to summary convictions and orders under Dominion Acts, is concerned. No doubt, the author intended to simplify his work, by annotating Acts of the Dominion of general application.

Before concluding this review of so important a work, we consider it to be our duty, and one we wish to exercise impartially, to take exception to Mr. Kerr's annotations on the 5th section of the 32 & 33 Vict., ch. 31, at pages 154 and 155. The section adverted to, is as follows:

"No objection shall be allowed to any information, complaint, or summons, for any alleged defect therein, in substance or in form, or for any variance between such information, complaint or summons, and the evidence adduced on the part of the informant or complainant, at the hearing of such information or complaint; but if any such variance appears to the Justice or Justices present and acting at such hearing to be such, that the person summoned and appearing, has been thereby deceived or misled, such Justice or Justices, may upon such terms as he or they may think fit, adjourn the hearing of the case to a future day."

The objections we have to make to the author's notes on this section are two in number, and have reference to the following annotations. The author first remarks upon the comprehensive nature of this clause, and adds: "In other words, however defective in substance or in form an information, complaint, or sum-

mons may be, *still that to the two first the defendant must plead to the merits*, and to the last urge no objection." We give in italics the objectionable portion, as implying that no plea other than one to the merits, can be urged by a defendant, however defective in substance or in form the information or complaint may be. The question arises, is this the law? Observe, that the clause does not state that no objection shall be *made* as to substance or to form, but simply that no objection shall be *allowed*; whilst the 67 sect. of the same Act enacts: "No judgment shall be given in favour of the appellant if the appeal is based on an objection to any information, complaint, or summons, or to any warrant to apprehend a defendant, issued upon any such information, complaint, or summons, for any alleged defect therein in substance or in form, or for any variance between such information, complaint, summons or warrant, and the evidence adduced in support thereof at the hearing of such information or complaint, *unless it shall be proved before the Court hearing the appeal that such objection was made before the Justice or Justices of the Peace before whom the case was tried, and by whom such correction, judgment, or decision was given,*" &c.

This latter clause establishes the converse of the rule laid down by the author, that a defendant is precluded from urging any objections in substance or as to form, against the information or complaint, by declaring that no such objections shall avail in appeal, unless it appears that they were made before the Justice upon the hearing of the case. At first sight, the practitioner might imagine that there is a contradiction between these two clauses. But mature reflection will lead to the conviction that they are to be reconciled, by due consideration of the powers vested in Justices exercising original jurisdiction, who are prohibited from *allowing* such objections to prevail, and the Court exercising appellate jurisdiction, which under section 67 of that Act, is vested with an important discretionary power of giving effect to such objections.

The remarks of the author may be consistent with the observations of English authors on the clause of the Imperial Act, from which section 5 is copied; but where we differ from the author is, that he has apparently overlooked the fact, that he will not find in the Imperial Acts any clause similar to section 67. It is essentially Canadian legislation, and a reproduction of our Provincial Act, 18 Vict. ch. 97, sec. 1, subsequently made law in

Lower Canada, by chap. 98 of the Consolidated Statutes of Lower Canada.

Our next objection to the author's annotation of sec. 5, is to be found at page 155, where he says: "But now a days it seems to be admitted that the powers of amendment do not extend to the substitution of one offence for another, or to the dealing with a case under another statute than the one upon which the information was laid."

The inference that might be drawn by Magistrates is, that they possess the power of amending the information, provided one offence be not substituted for another. The authorities quoted by the author do not support any such doctrine, and we must do the author the justice of saying that he does not distinctly affirm that principle. We deem it our duty, however, to remind Magistrates that they must not infer from the remarks of the author, that they possess any such power.

Justices of the Peace possess no such power unless specially conferred upon them by some particular Act. One instance might be mentioned where that power is given. In chap. 6, C. S. L. C. sec. 41, we find that with reference to prosecutions under that Act, the power of amendment before plea to the merits, is specially given. But in no other case, nor by any general law, does such a power exist. No clearer proof is needed of the correctness of our opinion, than the fact that the Dominion Act, by section 68, vests the power of amendment, not in Justices of the Peace but in the Court of appellate jurisdiction, by enacting with reference to convictions and orders that "the Court shall amend the same if necessary, and any conviction or order so affirmed, or affirmed and amended, shall be enforced in the same manner as convictions or orders affirmed in appeal."

This legislation is not new. In England a similar power was vested by 12 & 13 Vict., ch. 45, sec. 7, in the Court of Quarter Sessions appealed to, and in the Court before which the conviction or order might be removed by certiorari. Many defects in informations have been, in England, held to be cured by the defendant appearing and not objecting. But as to the power of Magistrates to allow amendments, we assert that under their commission they possess no such power; that no general law confers such power, and no amendment can be made without the consent of the defendant. In 2 Chitty's General Practice, p. 204, we read: "If the original information was defective, and the defendant upon

the hearing expressly waived the objection, then the Justice should, before he proceeds further, have the information made perfect, and should state in his conviction that fact, and the defendants waiving the necessity for a fresh summons, and then the conviction may state that the defendant was guilty of the said offence so charged in the said information, when the same had been so amended by and with the said defendant's consent as aforesaid."

We again repeat that Magistrates should not forget the remarks of the author quoted from page 7, that the work is restricted to Dominion Acts, and does not treat of their duties under Acts of the Local Legislatures.

In taking leave of Mr. Kerr's work, we cannot conclude our observations without calling public attention to a most important point suggested by the author in a recent conversation with him. It is with reference to the Act relating to Summary Convictions and Orders annotated in his work, and whether the Courts can give effect to its provisions, in so far as the civil jurisdiction of Magistrates is concerned, in relation to complaints and orders for the payment of money. In other words, could the Federal Parliament legislate upon subjects pertaining to the exercise of civil jurisdiction, although vested by any particular Act, in Justices of the Peace.

We are inclined to agree with him that there is great weight in the objection. Referring to the British North America Act, 1867, we find, that the exclusive powers of Provincial Legislatures are by paragraph 14 of section 92, declared to be as follows: "The administration of justice in the province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction, and *including procedure in civil matters in these Courts.*" As respects the powers of the Federal Parliament, we find in this connection, that it is enacted by paragraph 87 of section 91, that its jurisdiction extends to "The Criminal laws, except the constitution of Courts of Criminal jurisdiction, *but including the procedure in criminal matters.*"

We have italicized the words above quoted in order to show the force of the objection, that as respects the civil jurisdiction of Magistrates in relation to complaints and orders for the payment of money, our Dominion Parliament has possibly exceeded its authority in regulating the procedure in civil matters coming within the jurisdiction of Justices of the Peace.

If the Imperial Parliament has assigned to the Local Legislatures the *exclusive power* of regulating "procedure in civil matters," which would seem to include procedure in civil matters before Justices of the Peace; what law relating to procedure in the Provinces of Quebec and Ontario is to prevail with reference to Complaints? Assuming the Complaint to be, to obtain an order for the payment of money in relation to *a matter* over which the Parliament of Canada has jurisdiction, should the *procedure* be regulated by sections 20 & 24 of chap. 103 C. S. C., which require the Complaint to be *in writing and on oath*; as by the Dominion Act annotated by the author, which declares by sect. 20, *that it shall not be necessary that the Complaint should be in writing*, and by sect. 24, *that it may be made without any oath*?

EDW. CARTER, Q. C.

Montreal, 10th Jan., 1871.

## CHRONIQUE DU PALAIS.

### Re GUIBORD.

We give, on account of the novelty of the pretensions enunciated by the applicant in recusing the Roman Catholic Judges of the Court of Appeals, a report of the proceedings on the petition in recusation. The text of this petition is as follows:—

PROVINCE DE QUEBEC, }  
District de Montréal. }

### COUR DU BANC DE LA REINE.

#### (EN APPEL.)

DAME HENRIETTE BROWN,

*Appelante,*

ET

Les CURÉ ET MARGUILLERS de l'Œuvre et Fabrique  
de la paroisse de Montréal,

*Intimés.*

Aux Honorables Juges de la Cour du Banc de la Reine, siégeant en Appel, dans le dit District.

La Requête de l'appelante expose respectueusement :

Que par procuration passée à Montréal, devant maître C. H. Lamontagne et témoin, le premier décembre courant, et dont copie est pro-

duite avec les présentes, la requérante a formellement autorisé son avocat soussigné à récuser l'honorable Lewis Thomas Drummond, l'un des honorables juges de cette Cour, et qu'elle procède par les présentes à telle récusation pour les causes suivantes, savoir :

10. Parce que le dit honorable juge est catholique romain et, comme tel, le protecteur de l'Église catholique romaine et du corps ou communauté des catholiques romains, dont les intimés en cette cause font partie.

20. Parce que le dit honorable juge a intérêt à favoriser les intimés.

30. Parceque la communauté ou corps des catholiques romains est religieusement gouvernée par une autorité siégeant à Rome, Italie, à laquelle tous les membres de cette dénomination religieuse sont tenus de se soumettre et dont ils doivent en conscience exécuter les ordres, décrets ou injonctions.

40. Parceque cette autorité romaine s'est arrogé et s'arroe le droit et l'impose comme dogme aux membres du corps et de la communauté des catholiques romains, de commander à ces derniers de faire prévaloir la suprématie de la dite autorité romaine sur celle de tous les souverains, ce qui comprend Sa Majesté la Reine de la Grande Bretagne et d'Irlande et de ce pays.

50. Parceque l'autorité religieuse, à laquelle se trouve soumis le dit honorable juge, lui prescrit en conscience et sous peine d'anathème et d'excommunication, de méconnaître les dispositions suivantes du chap. 83 de la 14<sup>me</sup>, Geo. 3 (1774) rapporté dans les Statuts Refondus du Canada, savoir : " Et pour la plus entière sureté et tranquillité des esprits dans la dite province (de Québec) il est par ces présentes déclaré, que les sujets de Sa Majesté professant la religion de l'Église de Rome (savoir l'autorité romaine sus-mentionnée) dans la dite province de Québec, peuvent avoir conserver et jouir du libre exercice de la religion de l'Église de Rome, *soumise à la suprématie du Roi*, déclarée et établie par un acte fait dans la première année du règne de la Reine Elizabeth sur tous les pays qui appartenaient alors, ou qui appartiendraient par la suite à la couronne impériale de ce Royaume," et ce par les décrets, ordres et injonctions émanant de la dite autorité romaine, et promulgués depuis la cession du Canada à la Grande Bretagne, et le statut sus-dit, lesquels ordres de la dite autorité romaine ont déclaré qu'on ne pouvait croire et pratiquer ce qui suit, savoir :

10. " Qu'il appartient au pouvoir civil de définir quels sont les droits de l'Église et les limites dans lesquelles elle peut les exercer. (Art. 19 du Syllabus promulgué par l'Encyclique du 8 déc. 1864.)

20. La puissance ecclésiastique ne doit pas exercer son autorité sans la permission et l'assentiment du gouvernement civil.—Art 20.

30. L'Etat, comme étant la source et l'origine de tous les Droits, jouit d'un droit qui n'admet pas de limite.—Art. 39.

40. La puissance civile, lors même qu'elle est exercée par un souverain infidèle, possède un pouvoir indirect, quoique négatif, sur les choses sacrées. Elle a, par conséquent, non-seulement le droit



" d'*Exequatur*, mais encore celui que l'on désigne sous le nom d'*Appel comme d'abus*.—Art 41.

" 50. En cas d'opposition entre les deux puissances, c'est le droit civil qui l'emporte.—Art. 42.

" 60. L'autorité civile peut s'immiscer dans les choses qui regardent la religion, les mœurs et le régime spirituels. De là il suit qu'elle peut soumettre à son jugement les instructions que les pasteurs de l'Eglise publient en vertu de leur charge, pour la direction des consciences ; elle peut même porter des décisions en ce qui concerne l'administration des sacrements et les dispositions requises pour les recevoir.—Art. 44.

" 70. Les rois et les princes non-seulement sont exempts de la juridiction de l'Eglise, mais même ils sont supérieurs à l'Eglise, quand il s'agit de trancher les questions de juridiction.—Art. 54.

" 80. A notre époque, il n'est plus utile que la religion catholique soit considérée comme l'unique religion de l'Etat, à l'exclusion de tous les autres cultes.—Art 77.

" 90. L'Eglise n'a pas le droit d'employer la force ; elle n'a aucun pouvoir temporel direct ou indirect.—Art. 24.

" 10. L'immunité de l'Eglise et des personnes ecclésiastiques tire son origine du droit civil.—Art. 30.

60. Parce que l'autorité romaine sus-mentionnée, qui, depuis la cession du Canada à la Grande-Bretagne et le statut suscité, a décrété comme schismatiques, anathèmes et excommuniés ceux qui croiraient et pratiqueraient aucune des dix doctrines ci-dessus exposées, vient, par des décrets, bulles et injonctions récemment promulgués, d'être déclarée infaillible et comme s'imposant avec autant d'autorité que Dieu même à la conscience des catholiques romains et notamment à celle du dit honorable juge.

70. Parce que le dit honorable juge ne peut rendre justice à l'Appelante et condamner les intimés, sans violer toutes et chacune des propositions ainsi promulguées par la dite autorité romaine.

80. Parce que les intimés admettent eux-mêmes que la question en litige est une question où l'autorité romaine doit prévaloir au mépris de l'autorité de sa Majesté ou être méconnue et l'autorité de Sa Majesté prévaloir que le dit honorable juge, par sa profession de foi religieuse, est protecteur de la communauté, à laquelle appartiennent les intimés, et a intérêt à favoriser les dits intimés dans la décision de telle question et de cette cause.

En conséquence de ce que dessus et vu qu'il n'a été fait aucune déclaration par le dit honorable juge sur ce qui précède, la dite appelante déclare qu'elle récusé le dit honorable juge et le requiert humblement de déclarer par écrit, suivant la loi, si les faits ci-dessus et ci après sont véritables ou non, savoir :

10. Si le dit honorable juge est membre de la communauté ou corps des catholiques romains ?

20. Si les membres de ce corps ou communauté sont religieusement gouvernés par une autorité siegeant à Rome, Italie ?

30. Si cette autorité romaine a décrété, depuis la cession du Canada à la Grande-Bretagne et le statut sus-cité, qu'à peine d'anathème et d'excommunication, il fallait, pour le dit honorable juge, comme catholique romain, croire et pratiquer "que la puissance ecclésiastique doit exercer son autorité sans la permission et l'assentiment du gouvernement civil?"

40. Si cette autorité romaine a décrété depuis la cession du Canada à la Grande-Bretagne et le statut sus-cité, qu'à peine d'anathème et d'excommunication, il fallait, pour le dit honorable juge, comme catholique romain, croire et pratiquer "que l'Etat (savoir Sa Majesté et l'autorité dont le dit honorable juge tient sa commission de juge) n'est pas la source et l'origine de tous les droits et qu'il ne jouit pas d'un droit qui n'admet aucune limite?"

50. Si cette autorité romaine a décrété depuis la cession du Canada à la Grande-Bretagne et le statut sus-cité, qu'à peine d'anathème et d'excommunication, il fallait, pour le dit honorable juge, comme catholique romain, croire et pratiquer "que la puissance civile, lors même qu'elle est exercée par un souverain infidèle (c'est-à-dire non catholique romain) ne possède pas un pouvoir indirect, quoique négatif, sur les choses sacrées; qu'elle n'a par conséquent, ni le droit d'*Exequatur*, ni celui que l'on désigne sous le nom d'*Appel comme d'abus*?"

60. Si cette autorité romaine a décrété depuis la cession du Canada à la Grande-Bretagne et le statut sus-cité, qu'à peine d'anathème et d'excommunication, il fallait, pour le dit honorable juge, comme catholique romain, croire et pratiquer "qu'en cas d'opposition ou de conflit entre les deux puissances (savoir l'autorité religieuse telle que gouvernée par la dite autorité romaine et le pouvoir civil, dont le dit honorable juge tient sa commission) ce n'est pas le droit civil qui l'emporte ou prévaut, mais que c'est la dite autorité religieuse?"

70. Si cette autorité romaine a décrété depuis la cession du Canada à la Grande Bretagne et le statut sus-cité, qu' à peine d'anathème et d'excommunication, il fallait, pour le dit honorable juge, comme catholique romain, croire et pratiquer "que l'autorité civile ne peut s'immiscer dans les choses qui regardent la religion, les mœurs et le régime spirituel; qu'elle ne peut soumettre à son jugement les instructions que les pasteurs de l'Eglise publient, en vertu de leur charge, pour la direction des consciences; qu'elle ne peut même porter des décisions en ce qui concerne l'administration des sacrements et les dispositions requises pour les recevoir?"

80. Si cette autorité romaine a décrété depuis la cession du Canada à la Grande-Bretagne et le statut sus-cité qu'à peine d'anathème et d'excommunication, il fallait, pour le dit honorable juge, comme catholique romain, croire et pratiquer "que les rois et les princes (et notamment Sa Majesté) ne sont pas exempts de la juridiction de l'Eglise (savoir l'Eglise catholique romaine) et qu'ils ne sont pas supérieurs à l'Eglise (savoir l'Eglise catholique romaine) quand il s'agit d'ancher les questions de juridiction?"

90. Si cette autorité romaine a décrété depuis la cession du Canada à la Grande-Bretagne et le statut suscit   qu'   peine d'anath  me et d'excommunication, il fallait pour le dit honorable juge, comme catholique romain, croire et pratiquer "qu'   notre   poque, il est utile que la religion catholique romaine soit consid  r  e comme l'unique religion de l'Etat,    l'exclusion de tous les autres cultes?"

100. Si cette autorit   romaine a d  cr  t   depuis la cession du Canada    la Grande-Bretagne et le statut suscit  , qu'   peine d'anath  me et d'excommunication, il fallait pour le dit honorable juge, comme catholique romain, croire et pratiquer "que l'Eglise romaine a le droit d'employer la force et qu'elle a un pouvoir temporel direct et indirect?"

110. Si cette autorit   romaine a d  cr  t   depuis la cession du Canada    la Grande-Bretagne et le statut sus-cit   qu'   peine d'anath  me et d'excommunication, il fallait pour le dit honorable juge, comme catholique romain, croire et pratiquer "que l'immunit   de l'Eglise romaine et des personnes eccl  siastiques appartenant    cette Eglise ne tire pas son origine du droit civil, savoir de Sa Majest  ?"

120. Si cette autorit   romaine a d  cr  t   depuis la cession du Canada    la Grande-Bretagne et le statut sus-cit   qu'   peine d'anath  me et d'excommunication, il fallait pour le dit honorable juge, comme catholique romain, croire et pratiquer "que l'autorit   qui a d  cr  t   tout ce qui pr  c  de est infallible et par cons  quent doit   tre ob   e, comme si Dieu, sup  rieur    toutes les puissances de la terre, commandait lui-m  me de croire et pratiquer ce qui pr  c  de?"

Et si le dit honorable juge d  clarait n'avoir connaissance d'aucun d  cret, ordre, d  claration ou injonction comportant les prescriptions qui pr  c  dent, il est respectueusement requis de d  clarer, par   crit, suivant la loi:

10. S'il est membre de la communaut   ou corps des catholiques romains?

20. Si comme tel, il n'est pas soumis    l'autorit   religieuse qui si  ge    Rome, Italie?

30. S'il se consid  rerait li  , en conscience, par la doctrine contenue en la troisi  me question des pr  sentes conclusions, si elle avait   t   d  cr  t  e?

40. S'il se consid  rerait li  , en conscience, par la doctrine contenue en la quatri  me question des pr  sentes conclusions, si elle avait   t   d  cr  t  e?

50. S'il se consid  rerait li  , en conscience, par la doctrine contenue en la cinqui  me question des pr  sentes conclusions, si elle avait   t   d  cr  t  e?

60. S'il se consid  rerait li  , en conscience, par la doctrine contenue en la sixi  me question des pr  sentes conclusions, si elle avait   t   d  cr  t  e?

70. S'il se croirait li  , en conscience, par la doctrine contenue en la septi  me question des pr  sentes conclusions, si elle avait   t   d  cr  t  e?

80. S'il se croirait lié, en conscience, par la doctrine contenue en la huitième question des présentes conclusions, si elle avait été décrétée ?

90. S'il se croirait lié, en conscience, par la doctrine contenue en la neuvième question des présentes conclusions, si elle avait été décrétée ?

100. S'il se croirait lié, en conscience, par la doctrine contenue en la dixième question des présentes conclusions, si elle avait été décrétée ?

110. S'il se croirait lié, en conscience, par la doctrine contenue en la onzième question des présentes conclusions, si elle avait été décrétée ?

120. Si dans l'exercice de ses fonctions comme juge il se croirait lié, par sa foi ou profession religieuse, à l'obéissance à la dite autorité romaine ?

Et après que le dit honorable juge aura ainsi déclaré, l'Appelante demande humblement que cette honorable cour procédant à adjuger sur la dite récusation, la déclare bien fondée, le tout avec dépens suivant le sort final de cette cause.

JOSEPH DOUTRE,  
*Avocat de l'Appelante.*

Montréal, 1er déc. 1870.

Similar petitions were presented for the recusation of the other Roman Catholic Judges of the Court, C. J. Duval and M. M. Caron and Monk, J. J.

In presenting the petitions, Mr. Doutre, Q.C., counsel for the applicant, said that he hoped the measure he was adopting would not be looked upon as implying want of respect and confidence in the high character of the judges; but, on account of a strong pressure which had been brought to bear upon public opinion in this Province, a great number of persons were in doubt as to whether our Judges are the representatives of the Queen and carry out the spirit of the laws made under her sanction and that of her predecessors, or whether they are not in certain matters governed by the religious authority whose seat is at Rome.

Chief Justice Duval here remarked that it was, perhaps, giving too much importance to the imbeciles who think that Judges recognize any authority but that of the Queen and the law enacted under her authority.

Mr. Doutre replied that, unfortunately, these imbeciles were so numerous, and occupied so many positions in life, that until the Judges had themselves defined their stand-point, their decisions would remain in many cases without moral weight, and after due consideration he thought it essential before arguing his case, to

know whether the Judges felt themselves competent to hear him and give justice to his client. The condition of the Catholics since the cession of the country has been altered by decrees of new dogmas, some of which, if they are adhered to by Judges, would prevent the Catholic Judges from applying the law of the country. By chap. 83, 14th George 3rd, which confirmed the treaty of cession, the Catholics are granted the free exercise of their religion, but subject to the supremacy of the Sovereign. Several articles of the Syllabus declared it to be a heresy to believe that any Sovereign had authority over the laws decreed in Rome, and that in a conflict of jurisdiction in mixed matters, it was another heresy to recognize in Civil Law the power of pronouncing upon such jurisdiction. The right exercised by the appellant, which was fully recognized and practised in France at the time of the cession under the name of "Appeal against Abuses" is especially mentioned in the Syllabus to be proscribed, and it is worthy of anathema to attempt to make use of that recourse. The judge that would receive such an action and pronounce favorably upon it, would be liable to anathema and excommunication. I know very well, said Mr. Doutre, that none of the judges consider themselves bound by anything but the laws of the country; but in the present state of religious exaggeration, my own conviction in that respect is not a guarantee that will be sufficient for my client and the public. I have no doubt that the answer the Judges will give to the facts mentioned in this petition will be such as to put the appellant in a position to withdraw the exception, which she will be happy to be able to do. This opportunity is a precious one, and should not be lost for defining clearly the position of our Catholic Judges in these mixed questions and for putting an end to the injurious doubts which are being thrown on their independence and their true position with regard to the sovereign who appoints them and that other sovereign who claims authority over their consciences, with the right to define their jurisdiction and hurl defiance against the authority of our Queen, our Parliaments and our laws.

The Hon. Chief Justice ordered the Clerk of the Court to take the petitions, but not to file or place them in any way on the records of the Court.

At the next sitting of the Court, judgment was pronounced, refusing to permit the petition to be fyled, and treating the

charges contained in them as accusations of treason and perjury against the judges recused.

BADGLEY, J., observed that he sat in this case in a very singular and embarrassing position. He was the only judge who was not recused. The petition that had been presented to this Court was a petition to the Court of Queen's Bench, and the petition was presented to the Court as it sat on the 2nd December, when the Bench was composed of only four judges, Judge Drummond being absent, and His Honor understood that the Hon. Judge had expressed his intention not to participate in this proceeding. He, Mr. Justice Badgley, regretted very much that the Bench was not complete, because it was of great importance that all the judges should be present when a matter of this grave nature came before it. He had suggested to Mr. Doutre to present the petitions again before the full Bench as a simple matter of expediency and justice, and without having any ulterior object in view. His suggestions had not been adopted, and the consequence was that this petition was in the hands of three judges who were present, and one who was not present. As he himself had not been recused, his colleagues had given him the opportunity of opening the judgment. The petition was presented to the Court of Queen's Bench, and that Court was called upon to take notice and be informed that the petition recuses four judges of the Court. The petition stated a great many grounds, more or less connected with ecclesiastical affairs, but the principal charge was that certain proceedings had been adopted by the head of the Roman Catholic Church at Rome, and that those proceedings had had the effect of destroying the authority of the Government and civic power in certain cases. The Act of Elizabeth, known as the Supremacy Act, had been referred to, and it had been stated that that Act which governs this Province had been set aside, and the power of the British Government also set aside by certain proceedings that had been adopted at Rome. Whether these were abstract theories or not, His Honor would not inquire; it was a matter with which he had nothing to do. The law, the constitution and the Sovereign of the country were what the judges had to regard, and when His Honor found that in this petition the substance of it was to accuse the judges, in the first instance of treason, and in the second instance of perjury, His Honor was of opinion that the petition was not worthy of serious consideration at all. The Court had nothing to do with ecclesiastical law, it had to look to our own jurisprudence, and to see that the administration of justice could not be carried on with restrictions of this kind before the Court. The charges in the petition might be summed up under two heads, first, they accused his colleagues of treason, in it was pretended that by reason of these proceedings in would be unable to do their duty, and that they must cast egiance to the Queen. This was treason to all intents and ad it was too much to suppose that judges would lie under

such accusations. The second point was the charge that the judges would commit perjury, and violate their oath of office on account of those proceedings in Rome. The judges had taken an oath to administer according to law and justice, and yet they were told in this petition that they could not act according to law and justice, because certain proceedings had been adopted in a foreign land. It was too much to suppose that a paper which contained such charges could be admitted to the fyles of this Court. His Honor referred to a judgment at Quebec, *Canada Assurance Co. vs. Freeman*, in which it was held by the Judge that a paper containing charges of this nature, was not admissible to be fyled in a Court of justice. Judges Stuart and Panet expressed their opinions in that case in this sense, that the judges had but to look at the petition to see that it was inadmissible, and when judges of the highest learning, like Judges Stuart and Panet, were of this opinion, his Honor believed there could be no question at all that a petition, containing charges of this nature, was not admissible, and should not be put upon the fyles of the Court.

DRUMMOND, J., observed that he was absent when the petition recusing four judges was presented to the Court. He had felt great indignation on reading the petition, because he regarded the charge contained in it as insulting to the Bench. He differed from his colleagues in thinking that permission of the Court was necessary in order that the petition might be fyled, and believed that by our Code they might be fyled as a matter of course. His Honor then proceeded to read some notes prepared by him while under the impression that the petitions had been fyled. His Honor said: Our law on recusations was to be found entire in the Code of Civil Procedure of Lower Canada, Nos. 175-191, inclusive. The causes of recusation recognized by the Code No. 176, are seven in number. The 7th is as follows:—"If he (the judge) has any interest in favouring either of the parties." The following article (177) explains what is meant by the word "interest." "A judge is disqualified if he is interested in the suit either personally or on account of his wife, or if his wife, when separated from him as to property, is interested in the suit."

The question then arises whether these are all the cases in which recusation can be proposed. To facilitate the solution of this important question, it is necessary to observe that the legislation of our Code of Civil Procedure, as well as that of the French Code, are derived from the *Ordonnance* of 1667, from which they differ little as to the special causes of recusation. But both Codes had omitted two of the reasons contained in the *Ordonnance*, and this for wise reasons of equity and justice and public order. The part omitted was that of permitting recusation to be proposed for other reasons of fact or law. Carré and Chauveau, in stating their opinion that other causes of recusation cannot be admitted than those enumerated in the French Code, support it by a great number of authorities. His Honor referred at some length to the authorities there cited, and came to the conclu-

sion that Art. 176 of our Code must be interpreted in the same manner as Art. 378 of the French Code, and that recusation cannot be proposed for any other ground except those enumerated.

The petitions now under consideration are not founded on any of the causes of recusation enumerated in the law, but on grounds quite different—grounds which tend to dishonour not only the judges recused, but all the Roman Catholic judges in the whole vast extent of British territory—grounds unheard of up to this day in the annals of jurisprudence; for it is in truth the first time that a party has been bold enough to recuse a judge on account of his religious belief. These petitions must therefore be declared inadmissible and be rejected, simply "because the fact alleged is not included in the cases of recusation provided for by the law," according to the very simple formula adopted in France in like cases.

But here arises the question of greatest importance for us: "Has the judge recused the right to pronounce on the admissibility of the petition by which he is recused? To this question I do not hesitate to answer in the negative. His Honor cited Art. 184 of our Code, as follows: "When the recusation is made before the judge has made his declaration, communication of it must be given to him, and he must declare in writing whether the grounds are true or not; another judge then proceeds to determine whether the recusation is founded or not, without the recused judge having a right to be present."

This Article conforms to Art. 24 of title 24, of the *Ordonnance* of 1667, and is the same in the French Code. It is therefore evident that the law forbids the judge recused to pronounce on the admissibility of the petition in recusation, however frivolous, vexatious and unfounded may be the grounds of it; it seems to me equally evident that the judge recused is bound to declare in writing if the facts alleged in the petition are true, and that even before a competent tribunal has pronounced on the legality of such facts. It is to be regretted that our codifiers did not prefer to incorporate in our code the procedure established by Art. 385 of the French Code, as to the time when the declaration of the judge should be made, rather than have continued the old practice.

Under the disposition of the French Code, a judge recused is never bound to declare whether the facts alleged are true or not, until a competent tribunal has declared that these facts are of a nature to justify the recusation. Here it is different. The Judge recused must make his declaration forthwith, however insufficient in law may be the facts enunciated in the petition.

I am, therefore, of opinion, 1st, That these four petitions in recusation must be rejected *tôt ou tard*, as inadmissible. 2nd, That, nevertheless, we, the Judges recused, are incompetent to pronounce on the question of admissibility, and on any other question touching these petitions. 3rd, That on the fying of these petitions, we are bound to declare, in writing, the truth of the only fact on which rest



all these petitions, namely, whether it is true that we are each and all Roman Catholics, rejecting, however, every attempt to extort from us our opinions on the questions of law and religion raised in the recusation.

I must add that these were put into writing some days ago, when, being absent from Court, I was under the impression that these petitions had been duly fyled. But having been since apprised that the Judges, present at the time of the presentation of these petitions in open Court by the counsel for the appellant, had forbidden the clerk to file the petitions, I find myself free from any recusation of which I am bound to take cognizance.

CARON, J., concurred in declaring the petitions inadmissible. The Code contained the causes for which recusations might be proposed. The causes alleged in the present petitions were imaginary and absurd. It was for the Court to see whether the causes of recusation were legal before the petitions were permitted to be fyled. In the present instance, the petitions were wholly inadmissible and insulting to the Judges, and the Court was right in refusing to receive them, and the Judges were not bound to make any declaration.

DUVAL, C. J., thought the petitions should not be treated seriously. If it were possible to suppose that they were intended seriously, there could hardly be any greater insult offered to the Judges. It would be to accuse them of treason, and of being false to the oaths which they had taken. Judges had a right to protect themselves from such charges. But, for his part, he did not treat this petition seriously. There was only one opinion entertained by the Bench on the merits of it. If there were any foundation for such a petition, no Roman Catholics should be appointed Judges. It would be doing too much honor to the petition to treat it serious. It was enough to say that it shall not be received nor entered on the fyles of the Court. The principal question that arose was, had the Judges recused the right to declare the petition inadmissible? His Honor believed they had. The Judges were bound by the law to sit, and could not withdraw in this case more than in any other. The Judges in the Court below had not recused themselves or been recused, though two of them were Catholics. As to fyling the petitions without the permission of Court, His Honor believed that could not be done.

Mr. DOUTRE, Q.C., then moved for leave to appeal to Her Majesty's Privy Council. This motion stands over to March term.

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*Constitutionality of Acts of the Local Legislature in matters of Insolvency.*

There was rendered by the Circuit Court, Mr. Justice Torrance sitting, on the 30th November last, a judgment of considerable

importance, inasmuch as it involved the question of the validity of an Act passed during the previous session of the Parliament of Quebec. It was in the case of *Delisle vs. L'Union St. Jacques de Montréal*.

The action was brought to recover \$43 from the Defendants, a benefit or benevolent society, of which the Plaintiff's husband had been a member in his lifetime. The Plaintiff now claimed to be entitled to a weekly allowance of \$1.50 under the rules of the society, so long as she remained a widow. The Defendants pleaded an Act of the Legislature of the Province of Quebec, of date 1st February, 1870, cap. 58, by which the Defendants were empowered to convert the claims of the Plaintiff into a sum of \$200 to be at once paid over in satisfaction of all demands. The Plaintiff answered to this that the Legislature of the Province of Quebec had no authority to pass such an Act, and that the Act was unconstitutional, null and of no effect, inasmuch as the Legislature of Quebec had no power to legislate in matters of insolvency and bankruptcy, and the act in question violated vested rights.

*Per curiam*. The effect of this Act, according to the Plaintiff, would be to force her to compound for her debt. It is necessary to examine the powers of the Local Legislature in order to decide the point which was raised in the case.

By the Union Act, 30 Vict., cap. 3, sec. 91, it was declared that notwithstanding anything in the Act, the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects enumerated, and, *inter alia*, No. 21 specifies bankruptcy and insolvency as one of the classes of subjects. Then No. 29 declared that any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Then section 92 defines the subjects of exclusive Provincial legislation. "In each Province, the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say: No. 7. The establishment, maintenance and management of hospitals, asylums, charities, and eleemosynary institutions in and for the Province, other than marine hospitals." Then No. 11. "The incorporation of companies with Provincial objects." No. 16. "Generally in all matters of a merely local or private nature in the Province."

His Honor then referred to the preamble to the Act of the Province of Quebec passed last session, in which it was set up that the expenses of the Union St. Jacques were more than the receipts, and that the Society was unable to continue to pay the pensions to certain widows, of whom the plaintiff was one, and

the receipts could not be made to balance the expenditure, &c. Was there insolvency here? The Custom of Paris says, "*le cas de déconfiture est quand les biens des débiteurs tant meubles qu'immeubles ne suffisent pas aux créanciers.*" Bell's Dictionary says, "When a person's debts exceeded his estate he was said to be insolvent." Such being the condition of the Society, the Act provided that the Union St. Jacques was authorised to convert the pensions into \$200 to be once paid to each of the widows. In the event of refusal to accept the \$200, the money was to be kept in trust for them. The Court now came to the important question whether this Act was beyond the power of the Local Legislature. The Dominion Legislature has exclusive jurisdiction in matters of insolvency. From this and the other clauses cited above, the Court came to the conclusion that the Provincial Legislature had no power to make such a law as that passed last session with reference to the Union St. Jacques. The plea of the Defendants was therefore overruled, and the Defendants condemned to pay \$43.64, the amount sued for.

IVAN WOTHERSPOON.

## SOMMAIRE DES DÉCISIONS RÉCENTES.

### DÉCISIONS CANADIENNES.

#### COUR D'APPEL.

Montréal, 10 décembre 1870.

*La Corporation de St. Martin et la Compagnie des Chemins de Pêage de l'Île Jésus.*—La corporation de St. Martin prit une action devant la Cour de Circuit pour enlèvement d'une obstruction sur la voie publique. Par une disposition statutaire, la Cour de Circuit a seule juridiction pour connaître de ces actions. La Demanderesse joignit à son action une demande en dommages-intérêts au montant de \$400.00, mais cette demande fut discontinuée pendant l'instance.

Jugé:—Que la demande en dommages-intérêts étant purement accessoire et ayant été discontinuée, la Cour de Circuit conservait sa juridiction sur l'action principale.—Per Duval, J. C., Drumond, Badgley, J.J. Contrà, Caron et Monk, J.J.

*Quid?* Si la demande en dommages-intérêts n'avait pas été discontinuée.

*Macfarlane et Dewey.*—Jugé qu'un billet de \$400 donné par Mme. Dewey, sous la pression et les menaces d'une poursuite criminelle contre son fils pour vol de \$25, était nul, faute de considération et comme ayant été consenti en compromis d'une félonie. Per Drumond, Badgley et Monk.—Contrà Duval et Caron, qui étaient d'opinion que l'action de Macfarlane devait être maintenue pour \$25.

*The Chaudière Gold Mining Company et Desbarats.*—Jugé : 1o. que sous l'Édit de 1743, une corporation étrangère ne peut acquérir des biens immobiliers dans la Province de Québec, sans la permission de la Couronne ou l'autorité de la Législature ; 2o. que partant dans le cas d'une vente de tels biens et d'éviction, la dite corporation n'avait pas d'action en dommages contre son vendeur.—Per Caron, Badgley et Monk.—Contra Duval et Loranger.

*Ranger et Seymour.*—Jugé : qu'après discontinuation d'une saisie sur *feri facias* par le Demandeur, du consentement du Défendeur, un *venditioni exponas* ne peut être émané, la première saisie étant alors considérée caduque.—Per Duval, Caron, Drummond, Badgley et Stuart.

*Pollard et Irving.*—Avant le code de Procédure, le *capias ad respondendum* n'existait pas pour des dommages non liquidés. Mêmes juges.

*Doutre vs. Elvidge.*—Jugé : que l'adjudicataire, à une vente par le shérif d'un terrain de 49 acres, qui n'a pas la quantité déterminée, a droit à une réduction *pro rata* du prix d'adjudication. Semble : qu'il en serait autrement de la vente d'un corps certain. Per Duval, Monk et Loranger.—Contra Caron et Badgley.

#### COUR DE RÉVISION.

Montréal, 30 Novembre 1870.

*Fordyce vs. Kearns.*—Le défendeur, dans le but de faire de la terre neuve mit le feu à des souches sur sa propriété : un vent violent s'éleva tout à coup et propagea le feu sur la propriété de son voisin, le demandeur.

Jugé : Que le défendeur était responsable des dommages causés à la propriété du demandeur, bien que le feu y eût été communiqué par force majeure. Berthelot, Mackay et Beaudry, J.J.

*Davis vs. Shaw & Shaw, Oppt.*—Jugé : Que la vente d'effets mobiliers, entre parents, non suivie de déplacement et de tradition réelle, est présumée frauduleuse vis-à-vis des tiers créanciers et doit être annulée. Per Mackay et Beaudry ; Mondelet, dissident.

*Ste. Marie vs. Ostell.*—Jugé : Que l'adjudicataire des créances d'un failli, à une vente faite par un syndic, doit alléguer dans son action contre un débiteur de ce failli et prouver que toutes les formalités requises par la loi pour procéder à cette vente ont été observées ; et qu'à défaut de telle allégation, l'action de cet adjudicataire sera déboutée sur défense en droit. Per Berthelot, Torrance et Beaudry. Ce jugement est confirmatif de celui rendu en cour inférieure par l'hon. Juge Mackay.

30 décembre 1870.

*The City of Glasgow Bank, vs. Arbuckle & al. et Kerry & al.*—Jugé : Que quant à la liquidation des affaires d'une société après sa dissolu-

tion, les co-associés peuvent être traités comme si la société existait encore et peuvent être poursuivis comme tels, sans qu'il soit nécessaire de les désigner comme ayant été en société. Per Mackay et Beaudry ; Mondelet, dissident.

## COUR SUPÉRIEURE.

Montréal, 30 Novembre 1870.

*Carson vs. Bishop.*—Jugé : Qu'un père, non tuteur de son fils mineur, ne peut poursuivre pour les gages de ce dernier. Défense en droit maintenue. Mackay, J.

*Patenaude vs. Charron.*—Jugé ; Qu'une clôture de ligne ou de division, existant entre deux héritages depuis plus de trente ans, doit servir de base à un bornage, sans égard aux titres. Torrance, J.

*La Corp. de Montréal & Wilson, Tiers-Opposant.*—Jugé : Qu'après que l'évaluation d'un terrain, soumis à expropriation dans la Cité de Montréal, aura été mise de côté par la Cour, le propriétaire de ce terrain ne peut former une tierce opposition à ce jugement, bien qu'il n'ait pas été partie dans la première instance. Mackay, J.

*Le Blanc vs. Beaudoin & Bédard, intervenant.*—Jugé : qu'une partie coupable de félonie ne peut elle même demander la nullité d'un acte de vente d'immeubles faite en compromis de cette félonie. Mackay, J.

*Coates v. The Glen Brick Co., et Welsh, Intervenant.* Jugé que les compagnies incorporées sous l'acte de la Législature de Québec, 31 Vict. ch. 25, n'ont pas le pouvoir d'émettre des billets promissoires, à moins que ce pouvoir ne soit formellement donné par les règlements de la compagnie ; 2o. que dans l'espèce, les règlements étant que "the Directors shall have the management of the affairs of the Company" (sect. IX) et que "the President and Secretary shall have power to draw cheques, to sign deeds, stock certificates, all contracts authorized by the Board of Directors and all matters and documents of special import," et n'étant pas prouvé que les billets en question avaient été autorisés de manière à être placés dans la catégorie de *contracts authorized by the Board of Directors*, ils ne pouvaient lier la Compagnie. Beaudry, J.

*The Glen Brick Co. v. Shackwell. Shackwell v. The Glen Brick Co. Welsh v. The Glen Brick Co.*—Jugé que des souscriptions à un fonds social ou stock, obtenues par surprise, fraude et par de faux états des affaires de la compagnie faits par ses officiers et ses directeurs, sont nulles et ne produisent aucune obligation. Les actionnaires ainsi trompés peuvent même recouvrer ce qu'ils ont payé en à compte de leurs parts.

Montréal, Avril 1870.

*Malhiot vs. Tessier & Lemonde.*—Jugé : Que deux cultivateurs qui ont signé un billet promissoire ne sont pas obligés solidairement, et que

la solidarité n'existe que dans le cas où les faiseurs d'un billet sont commerçants. Mackay, J.

30 décembre 1870.

*Boucher vs. Brault.*—Jugé : Qu'un locataire, après avoir fait protester son locateur que la maison louée est inhabitable peut laisser cette maison, sans avoir fait résilier le bail et qu'une saisie-gagerie par droit de suite pratiquée par ce locateur est mal fondée, si le locataire prouve qu'en réalité la maison était inhabitable. S. C. Montréal, per Mondelet, J.

La rédaction de la Revue doit à l'obligeance de Mr. Colston le sommaire des décisions suivantes, prononcées à Québec en décembre dernier.

No. 22. *Leduc & Oullet.* Held : That the delay of 25 days mentioned in C. P. C. art. 1149, within which the petition in appeal from a judgment of the Circuit Court must be filed with return &c., is final and limitatif. Q. B. in appeal.

No. 14. *Villeneuve & Bédard.* Held : That pending an appeal from a judgment dismissing an action en séparation de corps et de biens, the Court will not grant a provisional alimentary allowance to the wife, Plaintiff in Court below. (Ibid.)

No. 881. *Ulric Arcand v. Charles Blanchet & François Croteau.*—In January, 1848, Croteau executed a deed of obligation for £50 and interest, in favour of Arcand's auteur, and mortgaged thereby a certain piece of land, which in June, 1855, he sold to Blanchet, who by the deed of sale bound and obliged himself to pay the said debt, and who the same day executed another deed of obligation, without novation for £75 and interest, being the principal and interest accrued on the original debt in favour of the Plaintiffs' auteur. Action against Blanchet and Croteau for joint and several condemnation for amount due under the said deeds. Action dismissed on demurrer. No action for a joint and several condemnation lies. S. C. Quebec, Taschereau, J.

No. 901. *Louis Lemieux vs. Marie Forcade*, curator to Gabriel Lemieux, her husband interdicted for drunkenness.

Held : That the defendant could be sued alone ; that her husband need not be put *en cause*, and that she need not be authorized specially for that purpose. Same Court, Taschereau, J.

#### ENGLISH DECISIONS.

*Park Gate Iron Company, Limited, and Coates.*—The provisions of 13 and 14 Vict. c., 61, s. 14, requiring the party appealing from the decision of a County Court judge to give a notice of appeal and security for costs within ten days, are not conditions precedent to the jurisdiction of the court to hear appeal, and they may therefore be waived by the respondent. 5 L. R. C. P., 634.

*Davies v. Sneed*.—The Defendant mentioned to the rector of her parish a rumour that she had heard publicly uttered, impugning his conduct and the conduct of his solicitor, the plaintiff, in the administration of a certain trust. The plaintiff having brought an action of slander against the defendant, the jury found that the words complained of were spoken *bonâ fide* and without malice, under the belief that it was important for the defendant's rector to know the rumour in order that he might clear his character :

Held : that, upon this finding, the communication was privileged, and that the privilege extended to the alleged slander of the plaintiff, as the communication could not be made without mentioning him. 5 L. R., Q. B. 608.

*Maillard v. Page*.—The defendant accepted the plaintiff's draft at six months, and the plaintiff agreed in writing to renew the bill, if circumstances should prevent the defendant from meeting it at maturity. The defendant made no application for renewal during the currency of the bill ; but on the plaintiff's presenting it for payment shortly after it became due, he claimed to have it renewed according to the agreement, circumstances having, in fact, prevented him from meeting it. In an action on the bill :

Held (Cleasby, B., dissenting) C. Ex. : that the defendant was not bound to apply for a renewal during the currency of the bill ; but that it was sufficient if he did so within a reasonable time after it became due. L. R., C. Ex., 312.

*Frost v. Knight*.—The defendant promised to marry the plaintiff so soon as his (the defendant's) father should die. During the father's lifetime, the defendant refused absolutely to marry the plaintiff. The plaintiff sued for breach of promise, the defendant's father being still alive :

Held (Martin, B., dissenting) : that the principle of *Hochster v. De la Tour*, was not applicable to the case of a promise to marry, and that no breach had been committed, 5 L. R., Ex., 322.

*Bell v. Fothergill and others*.—On the death of the deceased a will was found, the signature to which had been cut out, but gummed on to its former place. The will had been in the custody of the testator up to the time of his death. Declarations of the deceased made subsequent to the date of the will were proved of an intention to benefit his wife by will. No other will was forthcoming.

Held : that the presumption that the deceased cut out the signature *animo revocandi* was not rebutted, and that the gumming on the signature in its original place did not revive the will. 2 L. R., P. & D., 148.

*Hawkins v. Allen*.—A lady gave a cheque for £5,000 to the surgeon who attended her, to be laid out in the erection, establishment, and support of an hospital. The money was invested by the surgeon in

consols, in the names of himself and another as trustees, and both immediately afterwards executed a deed of trust declaring the objects of the gift. The declaration of trust was not made known to the donor, who died a few days after its execution.

Held: that the object of the gift did not exelude the acquisition of land; and that the donor having died within twelve months after the execution of the deed, the gift was invalid under the statute (9 Geo. 2, c. 36). L. R., Eq., 246.

#### AMERICAN DECISIONS.

(From the *American Law Review*, October, 1870 and January 1871.)

*Pierce v. Milwaukee & St. Paul R. R. Co.*—By the custom of a railroad company, persons whose grain was carried by the road, were entitled to have their empty bags carried free:

Held: that this carrying was not gratuitous, and that the company was liable as a common carrier in case such bags were lost. 23 Wisc. 387.

*The City v. Lamson.*—Suit on coupons detached from a bond brought more than six years after the instalment of interest for which such was given had accrued.

Held: That the suit was not barred by the Statute of Limitations until suit was barred on the bond itself. 9 Wallace, 477.

*Belknap vs. Bank of North America.*—A merchant sent his clerk to the Post Office with a sealed letter to mail, containing a bank check payable to A.B., or order:

Held: that he was not guilty of negligence which would render him liable on the check to a holder in good faith for value, to whom the clerk, after abstracting it from the letter, passed it, altered, by making it payable to bearer. 100 Mass. 376.

*Shaw v. Spencer.*—A firm gave to the defendant, as collateral security for a debt due from the firm to him, two certificates of stock, standing in the name of a member of the firm, namely "A. B. trustee," and by him transferred in blank, each certificate being on its face expressly "transferable only on the books of the company by the holder hereof, in person, or by a conveyance in writing recorded in said books, and surrender of this certificate." The certificate belonged to the plaintiff:

Held: that the certificates of stock were not negotiable instruments, that the word "trustee" sufficiently notified the defendant as to the character of the firm's title, and that plaintiff was entitled to the stock. 100 Mass. 382.

LE SECRÉTAIRE DE LA RÉDACTION.



# REVUE CRITIQUE

DE

## Législation et de Jurisprudence.

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### CONFLICT OF PRESCRIPTIONS.

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#### ERRATA.

Page 203, 6th line from foot of page, "demande" instead of "demanda."

Page 205, 13th line from top of page, "Grant" instead of "Lincoln."

Page 240, 6th line from foot of page, "examination" instead of "enumeration."

through even in those countries we see jurists of such high standing as Westlake and Bateman, strongly defending the claim of the *lex loci contractûs*. In a late case of *Horris v. Quine*, the learned Lord Chief Justice Cockburn inclined towards the latter view, although he admitted the *lex fori* to be the rule. And if to these considerations be added the fact that the question remains as yet undecided on the continent of Europe and in this Province, a review of the law on the question may not be found without interest and practical utility.

True it is that the legal profession in every country is familiar with the reasonings *pro* and *con*. At the same time it must be admitted that there exists no complete review of the different systems advocated throughout the commercial world. The English and American writers do not fail to produce every English and American authority, but they rarely pay to the French and continental jurists the attention and consideration which their learning

deserves, and the same disregard of English and American writers is manifested by the European jurists. Thus, Félix, Troplong, Marcadé, and even Savigny, make little or no allusion to the English and American jurisprudence; and when we refer to the English or American writers, we find that in their appreciation of the opinions of French and continental jurists, they fall into many inadvertent mistakes, sometimes into grave errors. Thus, Dr. Parsons, in his late work on Notes and Bills, affirms, upon the alleged authority of Pardessus, "that in France the limitation and prescription of the place where the contract was made would prevail, no matter where the contractor was used," (vol. 2, p. 382) whereas Pardessus supports the *lex loci solutionis*, and in default of it, the *lex domicilii debitoris* at the time of the contract. Again, at page 383, foot note *c.*, the learned professor states it to be the opinion of Pothier that the *lex loci* and not the *lex fori* should govern, whereas Pothier never speaks of any but the *lex domicilii creditoris*. Mr. Guthrie, p. 219, in turn, says that Pardessus and Boullenois favour the *lex domicilii debitoris*, and does not notice the distinction which both these commentators make, when a place of payment is specified. Mistakes have even been committed by writers in their citation of works composed in their own language. Thus, Félix asserts that Dunod favours the *lex domicilii debitoris* at the time of the institution of the action, whereas it is the *lex domicilii debitoris* at the time of making the contract which is supported by Dunod. These examples, to which many others might be added, show the importance of a careful and detailed investigation of the subject.

In this Province there exists a wide diversity of opinion. In the late case of *Wilson v. Demers*, the question was raised before all its tribunals, and was differently decided by each of them; but before going into the grounds of these varying judgments, the facts of the case must be briefly stated.

Demers, the defendant, a native of Chambly, P. Q., went to Fonds du Lac, Wis., and there carried on business for some years. In the course of his dealings in the city of New York, in 1857, he gave his promissory note to Wilson, the plaintiff, payable four months after date, at a particular bank, at Fonds du Lac. A few months afterwards he left Fonds du Lac, and, returning to Canada, began business at Valleyfield, near Montreal; and, so as not to differ from the honorable judges in appeal on mere matters of fact, it may even be said that he absconded

from the United States, as their Honors held; for it is quite immaterial to the decision of his case whether he did or did not leave his American domicile suddenly, secretly, and fraudulently. Demers has ever since the beginning of the year 1858 resided at Valleyfield. Wilson alleging that he became acquainted with the whereabouts of his debtor only on the 19th of April, 1866, and that by the laws of the State of New York and the State of Wisconsin, the said promissory note was not prescribed, brought his action thereon before the Superior Court in Montreal, against Demers.

The defendant first demurred to this demand, upon the ground that that court had nothing to do with those foreign laws, prescription being governed by the *lex fori* exclusively. This demurrer was maintained by the court below, his Honor Mr. Justice Berthelot holding that "the prescription of a promissory note made in a foreign country, and payable there, is to be governed by the *lex fori* and not by the *lex loci contractûs* or *lex loci solutionis*." \* This decision having been appealed from to the Court of Queen's Bench, was reversed on a point of procedure; and the question at issue was reserved until the final determination of the case on the merits.

The defendant also pleaded, 1st, the general statute of limitation of six years, 10 Vict. c. 11; 2nd, a special prescription of five years, under 12 Vict. c. 22, applicable to bills of exchange and promissory notes *due and payable in Lower Canada*.

These pleas were dismissed by His Honor Mr. Justice Mondelet, before whom the case was argued on its merits, the learned judge holding that the true rule of both the old and the new French jurisprudence, which should prevail in Lower Canada, is the *lex loci contractûs* or the *lex loci solutionis*, when a place of payment is specified. †

Brought before the Court of Review, in Montreal, the decision of Mr. Justice Mondelet was reversed by Mackay and Torrance, JJ., on the 30th of November, 1868. His Honor Mr. Justice Mackay, for the Court, maintained that both pleas were well founded, that the statute of limitations fully applied to this as a commercial case, that the Promissory Note Act equally applied, and that the words "due and payable in Lower Canada," therein used, involved no more than "due" or "due and exigible"; and

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\* 12 L. C. Jurist, 222.

† Ibid.

in support of this ruling the learned judge quoted Symond's Law Making, p. 413. He concluded his opinion by the following remarks:

"Volumes have been written on the domicile of the debtor, as affecting the remedy or the suit; about his domicile, at the time of the contract, at the time of the suit; on the place of the contract, the place for payment, &c. The Bar is familiar with the reasonings *pro* and *con*. As many authors are on one side as on the other. The old ones were divided, and so are the new. *Pothier* has been attacked for his opinions by *Troplong*, and lastly *Troplong* by *Marcadé*. A refuge can be found only in the old general rule, that the *lex fori* must prevail in cases of personal action such as the present one." \*

The case having been taken into the Court of Queen's Bench, by Wilson, the decision of the Court of Review was reversed, upon the ground that the defendant absconded from the United States, and that his creditor did not discover his whereabouts until shortly before the institution of the action, their Honors applying to this case the maxim of the Roman law: "*Contrà non valentem agere nulla currit præscriptio*." †

Mr. Justice Badgley, however, held that in general and ordinary cases, the *lex fori* should rule in matter of limitation of personal actions, 1st, because prescription affects merely the remedy; and 2nd, because prescription is a law of public order and policy.

The honourable Chief Justice and Mr. Justice Monk expressed no opinion whatever as to the *lex loci contractûs* or the *lex fori*, and simply concurred with Mr. Justice Badgley in holding that, as the defendant had been guilty of fraud against his creditor by absconding from the United States and by not informing his creditor of his removal to Valleyfield, the laws of Lower Canada could not be invoked for his relief.

Mr. Justice Caron concurred in the judgment of the Court, for, amongst other reasons, the following: "*D'après notre droit commun applicable*," he said, "l'absence du défendeur telle que prouvée a interrompu la prescription et l'a empêché de courir au préjudice du demandeur."

It is admitted that prescription is a law of public order and policy; and yet the public interest is superseded by the private

\* 13 L. C. Jurist, 24.

† 14 Ibid.

interest of a creditor. If such reasoning were logical, no one could be astonished at the ruling of the honourable court.

It is because prescription is a law of public order and policy that no attention should be paid to the fact that the defendant was absent or had absconded from a foreign country, and that the protection of that law which has been enacted to secure the peace of the whole community should be extended to all, to foreigners as well as to residents. Is the maxim *privatum incommodum publico bono pensatur*, not applicable in this as in all civilized countries? Clearly, the reasoning of Mr. Justice Badgley should have led him to a conclusion absolutely the reverse of the one at which he arrived.

In the case of *Lippman v. Don*,\* the defendant, Sir A. Don, had left France for parts of England unknown to his French creditor; and yet the counsel and judges in the case never for a moment entertained the idea of invoking the maxim *contrà non valentem agere non currit præscriptio*. Still, the English statutes of limitations contain an exception in favour of persons "beyond seas," whether they be creditors or debtors, provided that the limitation had not commenced to run. But this exemption was never applied to foreign prescription.

In virtue of what law, moreover, can absence, fraud, or any other disability of a creditor to bring his suit in due time, be held a cause of interruption of short prescriptions, such as prescriptions of five or six years in commercial matters. Not a single authority was quoted or indeed can be quoted in support of this novel proposition. It is true that absence is a cause of interruption of long prescriptions, such as those affecting real rights, because the *Coutume de Paris*, which is part of our common law, expressly declares and enacts that prescription can be thus interrupted; but that law never extended this rule to short prescriptions. †

True, the ordinance of 1673, in an express article, declares that the five years prescription of bills of exchange runs *à l'égard des mineurs et même des absents*. But as the commentators observe,

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\* *Infrà*, p. 140.

† *Massé*, 1 Dr. Com. 257, 492; *Rivière*, *Répétitions Ecrites*, 395; *Pardessus*, *Lettre de Change*, No. 331; *id.* Dr. Com. No. 1990; *Merlin*, *Répertoire*, Sup. t. xvii, p. 589; *Troplong*, *Prescription*, t. 2, No. 1038; *Paris*, 23 avril 1836, *Dev.*, 26, 2, 258; *Delangle*, t. 2, p. 727; *Bédaride*, *Des Sociétés*, t. 2, p. 699; *Pothier*, *Lettre de Change*, p. 206.

this restrictive proviso was unnecessary, it being already a principle of the common law. The Code Napoleon contains no such proviso; and yet all the jurists and courts of justice reject absence of plaintiff or defendant as a cause of interruption of prescription in commercial matters.

The *Coutume de Paris*, in order to make absence a cause of interruption of prescription of real rights or actions, made a special enactment to that effect, which would have been unnecessary if the common law had been as alleged.

Heretofore in Lower Canada, prescription in commercial matters was generally of one year, under the article 126 of the *Coutume de Paris*; but no provision was made for cases of absence, minority, interdiction, or any other like disabilities; and as Pothier remarks,\* no interruption could be presumed.†

The same rule has been maintained with regard to the prescription of five years of arrears of *rentes constituées*. The ordinance of 1510, which introduced that prescription, has no disposition with regard to minors, absentees, or other like persons; and consequently absence, minority, or any other disability was not considered a cause of interruption of that short prescription.‡

Finally our statutes of limitations in commercial matters have been framed upon the English statutes of limitations; still they do not contain the exception made in favour of persons "beyond seas," by the statutes of James and Anne. The 10-11 Vict., c. 11, enacts that no action, of a commercial nature, shall be maintained unless commenced within six years; and it is remarkable that the only exception provided for is where there has been an acknowledgment of the debt in writing or a partial payment, while the Promissory Note Act contains no exception whatever. Therefore absence, or any other disability, not being mentioned in either of these statutes, the Legislature clearly intended that absence, minority, or any other disability, should not be held a cause of interruption, for the simple reason that prescriptive laws are laws of public order and policy.

Moreover, has not our Provincial Legislature expressly sanctioned this rule, by enacting special exceptions in favour of absentees and

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\* Des obligations, p. 717.

† See also arrêt of the 3rd February, 1650, reported by Grillon. Recueil des arrêts.

‡ Arrêt of the 1st June, 1548, Traité des Minorités par Mesle, p. 502.

other like persons in respect to the limitation of the time for bringing certain appeals? \*

This construction of statutes of limitations is moreover strongly supported by the authorities.

"Indeed," says Angell, on Limitations, ed. 1869, § 194, "there appears to be no authority in favour of the doctrine that if the persons mentioned in the above section are not expressly excepted from the operation of the statute of limitations, there exists a *virtual* exception. But it has been holden that no exception can be claimed unless expressly mentioned. † General words of a statute, it is considered, must receive a general construction, and unless there can be found in the statute itself some grounds for restraining it, it cannot be restrained by arbitrary addition or retrenchment. ‡ And on this principle it was adjudged by Sir Wm. Grant that *absentees* who are not expressly excepted in the act of limitations of Jamaica were intentionally rejected, and therefore could not be introduced by construction; and it was also declared by Sir Eardly Wilmot in the House of Lords, that *infants*, like other persons, would be barred by an act limiting suits at law, if there was no saving clause in their favour. §

The disability of being "beyond the seas," provided for by the English statutes of limitations and those of most of the States of the American Union, is omitted in the statute of New Jersey as well as in that of the Province of Quebec; and consequently is not recognised by the courts of that State. ||

In the case of *Fenn v. Bowker*, ¶ the Court of Appeals of Lower Canada laid down the same rule, and held that although at common law an acknowledgment in writing or a partial payment did operate as an interruption of prescription, yet as the Promissory Note Act contained no exception, the court would not make one. How can the honourable court reconcile its ruling in *Fenn v. Bowker* with its ruling in *Wilson v. Demers*, more

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\* Cons. St. L. C., c. 77, s. 55.

† *Bucklin v. Ford*, 5 Barb. (N. Y.) sup. ct. 393; *The Sam Slick*, 2 Curtis, C. C. 480; *Howell v. Hair*, 15 Alab. 194.

‡ See Mr. Chancellor Kent in *Demarest v. Wynkoop*, 3 Johns 129.

§ *Beckford v. Wade*, 17 Ves. R. 87.

|| *Buckinghamshire v. Drury*, cited in *Beckford v. Wade*, *Beardsly v. Southmayd*, 3 Green, 171; *Taberner v. Brintnall*, 3 Harr. (N. J.), 262.

¶ 10 L. C. Jurist, 120.

especially as the common law never admitted absence or any other disability as a cause of interruption of commercial prescription?

Finally the judgment of the Court of Queen's Bench is contrary to the letter of our Code. Article 2269 is indicated by the *Codificateurs* as showing the old law to be that "prescriptions which the law fixes at less than thirty years, other than those in favour of subsequent purchasers of immoveables with title and in good faith, and that in case of rescision of contracts mentioned in article 2258, run against minors, idiots, madmen, and insane persons, whether or not they have tutors or curators, saving their recourse against the latter."

If absence of the debtor suspended prescription in commercial matters, as the Court of Appeals has held, according to the maxim *contra non valentem agere nulla currit prescriptio*, *à fortiori* prescription should not run against minors; for as it has been very properly said, "les absents méritent moins de faveur que les mineurs et les interdits." \*

Mr. Justice Caron further urged that the Promissory Note Act did not apply to Demers' note, because it was not *due and payable* in Lower Canada. However, that statute does not require that the note should be *made due and payable* in Lower Canada; the words *due and payable* involve no more than *due and exigible*, and every promissory note sued upon in Lower Canada must be considered as *due and payable* in Lower Canada.

Even granting that the 12 Vict. c. 22, does not apply to this case, then the 10-11 Vict. c. 11, does. If the 12 Vict. merely refers to notes made due and payable in Lower Canada, it cannot be reasonably assumed that the same does supersede in this case the 10-11 Vict., which provides for the limitation of all notes payable in or out of Lower Canada. Mr. Justice Caron is of opinion that the 10-11 Vict. has been repealed by the 12 Vict. This was certainly not done by express enactment; it can only be inferred from the fact that the 12 Vict. provides for the prescription of promissory notes. But if that statute does not comprise all notes, v. g. that of Demers, then it cannot be considered as repealing the former statute in respect of the same.

But, not to be severe upon the judgment of the learned judges, it must be mentioned that two of their Honors expressed a dictum a "je pense" upon the real question at issue; it may even be

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\* Laurent, Principes du Droit Civil, vol. 2, p. 148.



said that they were of the opinion that the *lex loci contractus* or *solutionis* should rule in all cases of prescription of personal actions. No authority was quoted, no argument made to support the proposition. "Je pense," said again Mr. Justice Caron, "que le juge Mondelet a bien jugé en disant que c'était d'après la loi du lieu où avait été fait le billet ou bien de celui où il avait été mis payable, que la cause se devait décider; *cela étant*, d'après la preuve, la prescription n'était pas acquise, et le défendeur a été bien condamné." By *celu étant*, does the learned judge intend to convey the idea that the proposition he enunciated should be accepted as a matter of course. The question, however, is extremely complicated and difficult; and as it is the only point worthy of any notice in the decision of the learned judges, we shall say nothing further of the judgment of the Court of Queen's Bench; and we will now endeavour to show that the rule laid down by Mondelet, Drummond, and Caron, JJ., is unfounded in law, and that the *lex fori* should govern in all cases.

Relying upon the authority of Boullenois, Pardessus, Félix, Troplong and Savigny, Mr. Justice Mondelet drew the conclusion "that the true doctrine is that the prescription of the place of payment must govern, and where the place of payment is not specified, then that of the place where the contract was created."

Boullenois holds the law of the place of payment, and if no place of payment be specified, the law of the domicile of the debtor, and not, as the learned judge asserts, the *lex loci contractus*.\*

The old French commentators, moreover, do not appear to concur in the opinion of Boullenois.

Dunod, † contends that the law of the domicile of the debtor, at the time of the contract, governs.

Merlin ‡ quotes two *arrêts* of the Parlement de Flandre, the first of the 17th July, 1692, the second, of the 30th October, 1705, which held the law of domicile of the debtor at the time of the institution of the action to rule in all cases of conflict of personal prescriptions; and he further reports another case which originated before the Code Napoleon, and was decided in the same sense by the *Cour de Bruxelles*, on the 24th September, 1814.

\* T. 1, p. 530; t. 2, p. 488.

† Des Prescriptions, part 1, ch. 14.

‡ Répertoire, vo. Prescription, s. 1, § 3, par. 7.

Berryer and Laurière on Duplessis,\* express the same view. And if to the above authorities we add the old civilians Huber and Voet, and also Merlin, who evidently wrote under the influence of the then prevailing notions on the matter, it seems that the old French common law does not admit the *lex loci contractûs*.

It is contended that the weight of modern French authority is against the doctrine of the *lex fori*. But what is the present opinion in France and on the continent generally?

On reference to Pardessus, † we find first that his language has not been quoted in full by Mr. Justice Mondelet, for there the sentence contains these words, immediately after those cited: "et s'il ne l'a pas déterminé, par celui du domicile qu'avait ce débiteur lorsqu'il s'est obligé; *parceque la prescription étant une exception qu'il est permis au débiteur d'opposer à la demande de son créancier, c'est naturellement dans sa propre législation qu'il doit trouver ce secours.*" If the debtor is thus to look only to the law of his own domicile, and if his plea of prescription affects merely the remedy, as admitted by Pardessus,—what has the law of the place of payment, or of the domicile of the debtor at the time of the contract, to do with the case. Nothing; it seems clear that the reasoning of Pardessus should lead to the opposite conclusion, to wit, the *lex fori*, or *lex domicilii debitoris* at the time of the institution of the action; and it is remarkable that two years before the publication of his *Droit Commercial*, he had, in his *Eléments de Jurisprudence Commerciale* (page 112), pronounced in an unqualified manner for the latter opinion.

With regard to the alleged authority of Félix, ‡ it is astonishing that the learned judge did not quote a few pages further on. Félix lays down various exceptions to the rule *locus regit actum*, and among others, the case of limitation of personal actions. He contends that the law of domicile of the debtor at the time of the action should be the criterion, without paying any regard to the place of payment. He further declares that the *lex loci solutionis* is favoured only by Boullenois, Pardessus and Troplong among the French writers, and by Christin, Burgundus, Mantica, and Favre among the civilians.

That Félix is in favour of the *lex fori* is evident from the fol-

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\* Traité de la Prescription, liv. 1, chap. 1.

† Droit Commercial, t. 6, No. 1495, p. 383.

‡ Droit International, p. 221 *et seq.*

lowing remarks, made by him after reviewing the various systems advocated in this matter: "*Bien qu'il y ait quelques différences dans les termes employés par ces auteurs, on voit qu'ils aboutissent tous à cette conclusion que la prescription s'acquiert d'après la loi en vigueur au lieu où siège le juge compétent, pour statuer sur les actions personnelles formées contre celui qui oppose cette défense.*"

Troplong holds that the law of place of payment should rule in all cases. \*

Savigny † is decidedly in favour of the doctrine maintained by the honourable judge. "Many say," he remarks, p. 201, "that laws as to prescription are laws of procedure, and must, therefore, be applied to all the actions brought within their territory, without respect to the local law of the obligation.

"According to the true doctrine, the local law of the obligation must determine as to the term of prescription, not that of the place of the action; and this rule, which has just been laid down in respect to exceptions in general, is further confirmed in the case of prescription, by the fact that the various grounds on which it rests, stand in connection with the substance of the obligation itself. Besides, this opinion has always been acknowledged to be correct by not a few writers."

Savigny finally holds the view that when a place of payment is specified, the law of that place should apply, in pursuance of the rule, *contraxisse unusquisque in eo loco intelligitur in quo, ut solveret, se obligavit*.

Savigny (in foot note *u*) further observes, that this doctrine is agreed to by Hert, § 65; Schaffner, § 87; Wachter, 2, pp. 408-412; Koch, 1, p. 133, note 23; and Bornemann, 1, p. 66; but that their agreement is only in regard to the principle, not to all the applications of it; since the local law of the obligation is not determined in the same way even by these writers. In fact Hert and Schaffner are of opinion that the *lex loci solutionis* should be entirely overlooked, and that the *lex loci contractûs* should rule in all cases.

In addition to the foregoing authorities referred to by Mr. Justice Mondelet, as supporting his decision, Demangeat, ‡ Domin-Petrushevce, § and Massé || may also be quoted.

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\* Prescriptions, No. 38.

† Conflict of Laws, Guthrie's ed., 1869.

‡ Demangeat on Félix, vol. 1, p. 223, note *a*.

§ Précis d'un Code de Droit International, art. 197, p. 88.

|| Dr. Com. vol. 1, Nos. 558-565, ed. 1861.

Demangeat, although not positive, inclines for the *lex loci contractus* exclusively.

Domin-Petrushevecz says: "L'objection de prescription est jugée d'après la loi suivant laquelle la convention ou le droit en question lui même est jugé."

Massé adopts the view of Troplong. "Il faut donc arriver," he says, p. 460: "au dernier système qui évite ces inconvénients, tout en se rattachant d'ailleurs au principe par lequel on rapporte la prescription, non à la formation du contrat, mais à son inexécution. Ce système fait prévaloir la loi du lieu de paiement ou de l'exécution, quand un lieu a été indiqué, et celle du domicile du débiteur, quand aucun lieu n'a été indiqué pour le paiement, parce que c'est là que l'obligation est payable." Massé quotes in support of his view Casaregis,\* and a decision of the Senate of Chamberry (1593), reported by Favre, and thereupon he attacks Pardessus,† for holding that, when no place of payment is specified, the law of domicile of the debtor at the time of the contract, and not at the time of the institution of the action, should be applied. "J'ai donc de la peine à m'expliquer pourquoi M. Pardessus qui reconnaît que la prescription doit être réglée par la loi du lieu où le débiteur a promis de payer, veut que dans le cas où ce lieu n'est pas déterminé et où par conséquent, le paiement doit être demandé au domicile du débiteur, la prescription soit réglée par la loi du domicile qu'avait le débiteur au moment où il s'est obligé, bien que, s'il y a eu changement, le paiement ne doit pas être fait à ce domicile."

Marcadé on art. 2219 of the *Code Napoléon*, in turn attacks the opinion supported by Troplong and Massé: "M. Troplong," he observes, "qui tient pour la loi du pays où le paiement devait se faire, en donne cet incroyable motif, que la prescription extinctive des obligations étant la peine de la négligence du créancier, c'est la peine établie dans le lieu convenu pour le paiement que ce créancier doit subir, puisque *c'est dans ce lieu qu'il a été négligent*. . . . Nous avouons que loin de trouver une pareille raison fort simple, nous la trouvons au contraire fort bizarre, fausse deux fois pour une, comme on va le voir bientôt. . . .

"Ainsi, de quelque côté qu'on se tourne et quelque ordre d'idées qu'on prenne pour point de départ, on se trouve toujours ramené à cette conclusion, conforme à la doctrine des anciens

\* Discurs. 130, No. 25 et seq.

† Droit Com. No. 1495.

auteurs, que c'est uniquement le domicile du débiteur qu'il faut considérer ici."

Such is the state of opinion on the continent of Europe, upon the question under consideration; and it will be conceded that if no other resource than these authorities were to be found, it would be difficult, if not impossible, to arrive at a satisfactory conclusion. The review just made, clearly shows that no less than eight different systems prevail on the continent:

1. *The law of domicile of the creditor in all cases*, supported by Pothier and also by Dumoulin.

2. *The law of domicile of the debtor at the time of the institution of the action in all cases*, supported by John Voët, Pöhl, Thöl, Bar, Berroyer and Laurière on Duplessis, Arrêts of the *Parlement de Flandre* (17th July, 1692, and 30th October, 1705), Bruxelles, (24th September, 1814), Merlin, Marcadé, Arrêts de Cologne, (7th January, 1836, 4th April, 1839, and 14th December, 1840), Cour de Cassation of Berlin, (8th October, 1838.)

3. *The law of the place of the contract in all cases*, supported by Hert, Mansord, Rocco, Reinhardt, Schaffner, Demangeat; Douai (16th August, 1834); Paris, (7th February, 1839. Alger, 18th August, 1848, and 18th January, 1840.)

4. *The law of the place of the contract, and when a place of payment is specified, the law of that place*, supported by Wachter, Koch, Brunnemann, Savigny, and Domin-Petrushevecz.

5. *The law of the domicile of the debtor at the time of the institution of the action, and when a place of payment is specified, the law of that place*, supported by Christin, Burgundus, Mantica, Casaregis, Favre, Boullenois, Troplong and Massé.

6. *The law of the domicile of the debtor at the time of making the contract, and when a place of payment is specified, the law of that place*, supported by Pardessus.

7. *The law of the domicile of the debtor at the time of the making of the contract in all cases*, supported by Dunod.

8. *The law of the place where the action is brought, in all cases*, supported by Paul Voët, Hommel, Félix, Huber, Weber, Tittmann, Mayer, Glück, Mittermaier, Mühlenbruch, de Linde, and by the English and American decisions, as will be seen hereafter.\*

\* In Scotland another system, still assented to by Guthrie on Savigny, prevailed in former times, viz, the law of the domicile of the debtor during the whole currency of the term of prescription.

It is evident that the question in controversy is not a question of local, but of international law, *une question d'école*, upon which the jurisprudence of all nations ought to be properly consulted and weighed. It is necessary that upon matters of this highly practical importance not only to a special community, but to the commercial world at large, there should be uniformity of decision. It is equally beneficial to the people of this country and to foreigners, when they deal with each other, that they should know that the obligations arising out of their transactions are submitted to the same rules of international law. There has been in England, Scotland and the United States, a uniformity of jurisprudence on this point, and it is against public policy for our courts to rule differently.

We find in the nature of the English Statute of Limitations, adopted by the United States and the British Colonies, another reason for adopting the *lex fori*. On the European continent, prescription is essentially a presumption of payment, which may be rebutted by contrary evidence; it is more an exception than a defence. On the contrary, in Canada as in England and the United States, prescription is a mere denial of action, so much so that the oath of the debtor, as to payment, cannot be demanded in a Court of Justice.

The law of prescription in force in Lower Canada being borrowed from the English one, it ought to be governed by the same rules in cases of conflict of prescriptions, viz., by the *lex fori*; and such was the opinion of the *Codificateurs* (3rd report, *Titre Prescription*, Art. 8); and their opinion is moreover in accordance with our jurisprudence.

In the case of *Côté v. Morison*,\* a note made in Mackinaw, State of Michigan, was declared to be subject to our quinquennial prescription (12 Vict., ch. 22), by the Superior Court of Montreal; and in Appeal that judgment was confirmed on other grounds, the Court remaining silent on the question of prescription.

In the case of *Fenn v. Bowker*,† the Court of Appeals maintained a plea of prescription of five years in an action on a promissory note made at Rochester, State of New York.

In the case of *Adams v. Worden*,‡ an action was brought upon a promissory note made at Plattsburg, New York. The defendant

\* 2 L. C. Jurist, p. 206.

† 10 L. C. J. p. 121.

‡ 6 L. C. Rep. p. 237.

pleaded the Statute of Limitations of the State of New York. To this plaintiff demurred: 1. Because the defendant cannot set up any foreign law or statute of limitations; 2. Because in Lower Canada there is no such law of prescription as is alleged in the exception. On the 15th December, 1852, judgment was rendered by the Superior Court at Montreal, composed of Day, Smith and Mondelet, J. J., dismissing the said plea of limitation, on the ground "that the laws of the State of New York whereby the pretended limitation is created, have no force or operation in this Province." In appeal the Court held this judgment premature, because the statute of the State of New York had not been proved.

In all the above cases, no place of payment was specified, but the above decisions do not the less conclusively lay down the principle that prescription is governed by the *lex fori* and not by the *lex loci contractûs*.

What can have been the cause of the conversion of Mr. Justice Mondelet from the opinion he held in *Adams v. Worden*? In his decision in *Wilson v. Demers*, the learned judge does not even notice his judgment in the former cause.

In Louisiana, another French Colony, which like Canada, has been transferred to a nation governed by the common law of England, and which like Lower Canada, has adopted many of the commercial laws of Great Britain, it is not surprising to find the English principle of the *lex fori* fully adopted.\* Mr. Justice Slidell remarked in *Lacoste v. Benton*: "There is a general principle which has been so frequently recognized by the Courts of this State as to be now beyond dispute. It is that prescription is a question affecting the remedy, and is controlled by the *lex fori*. The rule is not peculiar, however, to our Courts, but has become a universal one in international jurisprudence."

The courts of the Province of Ontario also have adopted the doctrine of the *lex fori* †. In the late case of *Darling v. Hitchcock*, a note made in Ontario, payable in Montreal, was prescribed by

\* *Union Cotton Manufactory v. Lobbell*, 9 Martin, 435 (1828), Matthews, J.; *Erwin v. Lowry*, 2, An. Louis, R. 314 (1847), Slidell, J.; *Newman v. Goza*, 2 *ib.*, 643 (1847), Slidell, J.; *Lacoste v. Benton*, 3 *id.*, 220 (1848), Slidell, J.; *Brown v. Stone*, 4 *id.*, 235 (1849), Rost, J.; *Bacon v. Dahlgreen* (1852), 7 An. Louis, Rep. 599, Eustis, C. J.; *Succession Lucas*, (1856), 11 *id.*, 296, *per* Spofford, J.; *Walworth v. Routh*, (1859), 14 *id.* 205, *per* Merrick, C. J.; *Pecquet v. Pecquet*, 17 *id.* 204.

† 2 Q. B. U. C. Rep. 265.

the law of Quebec, but not by the law of Ontario, and the defendant pleaded the Lower Canada prescription. The question principally was, whether a Court of Justice in Ontario was bound to enforce the Promissory Note Act,\* enacted by a legislature common to both Provinces, and declaring that all notes "due and payable in Lower Canada" should be considered as absolutely paid, unless sued on within five years from maturity. But as the note was made payable in Montreal generally, without the words "only, not otherwise and elsewhere," as required by the laws of Ontario, the same was considered as not payable in Lower Canada, and judgment went for the plaintiff. Chief Justice Draper, however, on delivering the judgment of the court, fully recognized the soundness of the *lex fori*. He said: "I take it to be equally true as a general proposition that a plaintiff has the full period prescribed by such local law (the law where the action is brought) for bringing his suit before it would be so barred."

What we have said would seem to be sufficient to show that in England, the rule of the *lex fori* is well established. It is, however, contended, upon the authority of Westlake,† and Bateman,‡ that the English decisions rest, 1. upon the authority of Story, and 2. on fallacies.

The case of the *British Linen Company v. Drummond*, decided on the 22nd May, 1830, has been often cited as a leading one bearing upon the question in controversy, and the principle therein laid down has been acknowledged in many cases anterior to the publication of Story's Conflict of Laws, as in *De la Vega v. Vinnna*; § *Trimbey v. Vignier*; || and *Hubert v. Steiner*; ¶ and it has been also admitted long previous to these cases, particularly in *Williams v. Jones*,\*\* and other cases cited in *Lippmann v. Don*, decided in the House of Lords on the 26th May, 1837,†† and although in that case Lord Brougham mentions the name of Story in conjunction with the names of Huber and Paul Voet, we will soon have occasion to shew that the doctrine laid down by his Lordship rested, not upon fallacies or the *dictum* of Story, but upon the soundest reasoning. Suffice it to say at present, that, notwithstanding the objections of Westlake and Bateman, the

\* 12 Vict. ch. 22.

† Private International Law, § 250 *et seq.*

‡ Commercial Law, § 143 *et seq.*

§ 1 B. & Ad. 284, 1830.

|| 1 Bing. N. C. 151, 1834.

¶ 2 Bing. N. C. 203, 1835.

\*\* 13 East. 439, 1811.

†† 2 S. & M. 682.



decision in *Lippmann v. Don* has been recognized as an authority in both Great Britain and the United States, and is taken, with the other precedents, as fixing the law of those countries.\*

That the *lex fori* is still the English rule is evident from the following authorities:

In the second edition of his *Leading Cases on Commercial Law* (1868), Mr. Tudor in reviewing the English jurisprudence on the matter, says, p. 280: "The limitation of actions clearly does not belong to, and will not be determined by, the law of the country where the contract was entered into, but by the law of the country where proceedings are taken to enforce."

Mr. Forsyth in his *Opinions on Constitutional Law* (1869), also remarks p. 249: "The *lex fori* applies to all modes of enforcing rights, and governs as to the nature, extent, and character of the remedy, including statutes of limitation."

In the case of *Harris v. Quine*,† decided in the Court of Queen's Bench, 7th June, 1869, by Cockburn, C. J., and Blackburn and Lush, JJ., the authority of *Huber v. Steiner*, and other cases above cited, were fully sustained. It must be admitted that

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\* 13 Peters, 327; 2 B. & Ad. 413; 1 id. 284; 10 B. & Cresw. 903; 3 Burge's Com. on Col. and For. Laws, 883; Principles of Equity by Lord Kames, vol. 2, p. 353; 4 Cowen, 528, note 10; id. 530; 1 Gall. 371; 2 Mason, 151; 6 Wend, 475; 1 Green's N. J. Rep. 68; 3 Peters, 270, 277; 5 id. 466; 8 id. 361; 13 id. 312; 13 id. 378; 13 Serg. & R. 395; 2 Rand, 303; 3 J. J. Marsh, 600; 8 Vern, 150; 3 Gilman, 637; 1 Meigs, 34; 7 Missouri, 241; 9 How, U. S. 407; 7 Maine, 337, 470; 36 Maine, 362; 1 Penn. State R. 381; 2 Mass. 84; 13 id. 5; 17 id. 55; 3 Conn. 472; 2 Bibb, 207; 2 Bailey, 217; 1 Hill, S. C. 439; 2 Dall. 217; 1 Yeates, 329; 1 Caines, 402; 1 Johns, 139; 3 id. 190; 3 id. 263; 11 id. 168; 4 Conn. 49; 2 Paine, C. C. 437; 2 S. & M. 682; 1 Ross's Leading Cases, 559-605; Angell on Limitations (ed. 1869), p. 52-64, No. 64-68; Parsons on Bills, p. 381-391 (ed. 1867); Phillimore on International Law, vol. 4, p. 573; Dickson on Evidence, pp. 532-537; Tait on Evidence, 3rd ed. pp. 460-465; Henry on Foreign Law, appendix p. 237; 5 Johnson, N. Y., 152; 10 B. & C. 816; 1 Smith, Leading Cases (ed. 1866), p. 954; N. 786; Story, Conflict of Laws, § 576, p. 576 and seq. (ed. 1865); Wheaton, International Law, p. 187; 1 Bing. N. C. 111; 2 id. 202; 3 Conn. 54; 1 Wis. 131; 10 Pick. 49; 11 id. 36; 6 Cush. 238; 13 East, 439; 2 Q. B. Rep. U. C. 265; 9 Martin's Rep. 435; 2 an. Louis Rep. 315; id. 646; 3 id. 221; 4 id. 235; The English Jurist, 1851 to 1855, p. 122; Ruckmaboye v. Mottichund (1852), 8 Moore, p. 4; *Hogan v. Wilson*, Stuart's Rep. p. 145.

† L. R. 4 Q. B. 653.

the Chief Justice felt inclined to adopt the *lex loci contractûs*, but he would not undertake to derogate from the well settled jurisprudence of England. "If the matter," he said, "were *res integra*, and I had to form an opinion unfettered by authority, I should be much inclined to hold, when by the law of the place of contract, an action on contract must be brought within a limited time, that the contract ought to be interpreted to mean: 'I will pay on a given day or within such time as the law of the place can force me to pay.'" His decision, however, was in the following terms: "On the question as to whether the judgment on the plea in the Manx Court is a bar to bringing an action in the courts of this country, I think we are bound by authority that it is not; *Huber v. Steiner*, and other cases, having decided that such a statute of limitations as the present, simply applies to matters of procedure, &c., not to the substance of the contract."

Blackburn and Lush, JJ., while concurring in the decision of the Chief Justice, expressed no opinion as to the soundness of the rule of the *lex fori*, but merely admitted the same to be the law of England.

In Scotland, however, the *lex fori* does not appear to have been long established, and, there, another system, which has not yet been noticed anywhere else, was in former times strongly supported. Mr. Guthrie, in his late translation of Savigny's *Conflict of Laws*, (1869), Note B., p. 219, says:—"The Scottish Courts, since the middle of last century, decidedly preferred the prescription of the debtor's domicile. . . . But they looked not to the debtor's domicile at the time of the action, but rather to the debtor's domicile during the whole currency of the term of limitation."

Mr. Guthrie, who quotes several Scottish decisions previous to *Lippmann v. Don*, as supporting this view, is of opinion that it is the real Scottish rule, but concludes his remarks by stating that "the case of *Lippmann v. Don*, renders it imperative to apply the *lex fori*, without respect to the domicile of the debtor, except in so far as this may fix the place where the action is brought." And so the Courts there have held since. See cases cited by Guthrie, p. 220, and decided in 1839, 1843 and 1854.

It may here be observed that Bateman, who wrote in 1860, on the *Commercial Law of the United States*, is not even noticed in *Power v. Hathaway*, decided 5th December, 1864, by the Supreme Court of the State of New York.\* By the Court, Smith,

\* 48 Barbour, 217.

J.: "It is a settled principle of international law that all suits must be brought within the period prescribed by the local laws of the country where they are brought. The *lex fori* governs all questions arising under the Statutes of Limitations of the various States of this country."

Merlin, Marcadé and Bar merge the rule of the *lex fori* in that of the *lex domicilii debitoris*, because the domicile of the debtor being the place where, by the common law, the action is brought, the two rules are really the same in their result. This, however, although true in most instances, is not so in the case where a foreigner, for instance, transiently in Lower Canada, or against whom jurisdiction is found by the possession of property therein, is sued in that country. As remarked by Mr. Guthrie, since the decision in *Lippmann v. Don*, the judgment would, in Scotland, be the same as if the defendant were domiciled within the jurisdiction of the Court. There is thus always regard to the forum, not to the debtor's natural and permanent forum, but to the forum in which the action is instituted. There is, however, no doubt that the French jurists who maintain the rule of the *lex domicilii debitoris*, meant in reality the *lex fori*, inasmuch as by the common law of France, no action can be brought but before *le juge du domicile du débiteur*, and a foreigner cannot implead another foreigner before the French tribunals, unless there has been some decree or judgment of a foreign court declaratory of the right of the claimant.\*

And now on what grounds are based the objections to the *lex fori*?

Firstly among the French jurists, Troplong and Massé urge that the *laches* of the creditors to sue must be considered as existing at the place of payment, and consequently must be dealt with according to the law of that place.

"La raison en est simple," says Troplong, No. 38, "la prescription afin de se libérer est, en quelque sorte, la peine de la négligence du créancier. Or, dans quel lieu le créancier se rend-il coupable de cette faute? C'est évidemment dans le lieu où il doit recevoir son paiement. Donc il encourt la peine établie dans ce lieu: donc la prescription qu'il doit subir se règle par la loi du même lieu."

"Ainsi," Marcadé replies,† "soit une dette contractée par un

\* The Cabinet Lawyer for 1864, p. 411; 1 N. Pigeau, p. 150.

† Sec. 6, p. 12.

Piémontais domicilié à Turin envers un Français domicilié à Paris, mais avec convention que le remboursement sera fait à Rome, (où d'ailleurs il faut supposer qu'il n'a pas été fait élection de domicile par le débiteur, puisqu'alors la question n'existerait plus, Rome devenant ainsi le lieu du domicile); c'est d'après la loi de Rome, quoique le débiteur n'y eut pas de domicile, que la dette se prescrit, et la raison en est simple, dit M. Troplong, puisque *c'est à Rome que le créancier a été négligent!* . . . . Comment! cet homme qui n'a jamais quitté Paris, vous me dites que pendant quinze ans, vingt ans ou plus, il a été négligent à Rome! C'est à Rome qu'il est resté dans cette longue inaction, à Rome qu'il s'est endormi dans cette insouciance prolongée, à Rome, lui qui n'y a jamais mis le pied! . . . . Il faut donc ici encore, comme au No. IV., rappeler à M. Troplong que *præsumitur esse quodm esse tale*, et que pour avoir été n'importe quoi à Rome, pour y avoir été négligent ou soigneux, insouciant ou vigilant, pour y avoir été tout ce qu'on voudra, il faut tout d'abord avoir été à Rome . . . . Qu'on nous dise que ce créancier a négligé son affaire de Rome, à la bonne heure: mais cette affaire de Rome où l'a-t-il négligée? C'est à Paris."

In the second place, Mr. Westlake, as the sole English representative of the *lex loci* adverse to the *lex fori*, says that Lord Brougham's opinion, in *Lippman v. Dow*, rests on two fallacies:—

"First, 'the argument that the limitation is of the nature of the contract, suppose that the parties look only to the breach of the agreement. Nothing is more contrary to good faith than such a supposition.' But this is to confound the interpretation of the contract with the operation on it of the *lex loci contractus*. . . . Secondly, 'it is said that by the law of Scotland'—the law which it was proposed to apply as governing the remedy—'the remedy alone is taken away, but the debt itself is extinguished. . . . I do not read the statute in that manner. . . . The debt is still supposed to be existing and enforceable.' There is however little or no meaning in saying that a debt subsists which cannot be recovered."

As to the first of Mr. Westlake's objections it would perhaps be sufficient to remark, that Lord Brougham referred merely to the issue of the parties, independent of the operation of the law upon that issue. The question, moreover, is not the effect or

operation of the *lex loci contractus*, but of the *lex fori*; and if the contracting parties contemplated a breach of the contract, and a suit upon the same, they must have had reference to the law of the place where that suit would be brought, for everything relating to that suit. But, as the noble jurist observes, and his observations are a complete answer to the remarks of Lord Chief Justice Cockburn:

"Nothing can be more violent than the supposition that the breach of the contract is in the contemplation of the parties, and indeed nothing more contrary to good faith. It is supposing that when men bind themselves to do a certain thing, they are contemplating not doing it, and considering how the law will help them in the non-performance of a duty. If the law of any country were to proceed upon the assumption that contracting parties have an eye to the period of limitation, and only bind themselves during that period, it would be sanctioning a faithless course of conduct, and turning the provisions which have been made for quieting possession after great *laches* on the part of creditors, and possible destruction or loss of evidence, into covers for fraudulent evasion on the part of debtors." \*

Mr. Westlake cannot discern a distinction between a debt that cannot be recovered *en justice*, and a debt extinguished *in se*. There is a wide difference between the two. 1. A debt extinct *in se* is not susceptible of payment, and the action *condictio indebiti* would then lie. But a debt declared prescribed may be paid, without danger of such an action; 2. In a case like the present one, the debtor is still liable to an action in the country where the contract was made or is payable. These characteristics of a debt which is prescribed are so plain that we need not be called on to quote any authority, and they clearly show that prescription does not affect the contract, but the remedy.

This rule is distinctly laid down in all the books, and should be applied to cases of conflict of prescriptions. The Civil Code of Lower Canada, art. 2183, states the old law to be that "extinctive or negative prescription is a bar to the action;" and the same principle is held not only by all the American and English jurists, but likewise by the French commentators.

"La loi," observes Merlin, "qui déclare une dette prescrite, n'anéantit pas le droit du créancier en soi : elle ne fait qu'opposer

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\* Ross, Leading Cases, vol. 1, p. 594, ed. 1854.

une barrière à ses poursuites." Even Boullenois\* properly remarks: "L'exception ne tombe que sur l'action et la procédure intentée." "Puisque," says Marcadé, "la prescription n'anéantit pas le droit du créancier par-elle-même et *ipso facto*, mais procure seulement au débiteur une exception qu'il lui sera facultatif d'opposer à l'action, c'est donc par la loi du lieu où ce débiteur doit être actionné, c'est-à-dire du lieu de son domicile, que la prescription doit tout naturellement se régler. Il n'importe pas qu'un autre lieu soit désigné pour le paiement, où ait été celui de la passation du contrat; car selon la pensée d'Huberus, la chose capitale à considérer, la chose à laquelle la prescription se rattache intimement, puisqu'elle vient en opérer l'extinction, c'est l'action et non pas telle ou telle circonstance de la convention: *jus ad actionem pertinet, non ad negotium gestum*."

The Court cannot supply a plea of prescription; it is personal to the defendant; and hence it must be ruled by the law of the place where he is served with process. "La prescription," says even Pardessus, "étant une exception qu'il est permis au débiteur d'opposer à la demande de son créancier, c'est naturellement dans sa propre législation qu'il doit trouver ce secours." †

In opposition to this plain, intelligible doctrine, Savigny, Massé and Westlake insist upon this last reasoning, that the *lex loci contractus* is the most reasonable rule, "because it excludes both the arbitrary power of the plaintiff to choose between competing forums that which allows the longest term of prescription, and the arbitrary power of the defendant to defeat his creditor by removing his domicile to the forum which allows the shortest term, and avoiding, while it runs, personal presence in the special forum of the obligation." ‡

Massé calls the result of such uncertainty *une conséquence déraisonnable*. But it is certainly more imaginary than real. No man can presume that when one removes from one country to another, his aim is to defeat his creditor by acquiring a shorter term of prescription. As to the arbitrary power of the plaintiff to choose between competing forums it is certainly not a hardship to him; and again with regard to the debtor, it suffices to remark that he is the best judge of his own interest, and as said with Story, § 1174 that "if he chooses to remove to any particular territory,

\* *Œuvres*, 22 vol. 2, p. 402.

• *Œuvres*, vol. 2, p. 121.

‡ *Westlake*, p. 137.

he must know that he becomes subject to the laws of that territory as to all suits brought by or against him."

If, however, inconvenience can be urged as grounds of reasoning, it may be stated that if the *lex loci contractûs* should be the rule in one country, for instance in Lower Canada, its citizens would in many instances be placed at a great disadvantage as regards their neighbours. In Ontario and in most of the bordering States, prescription in commercial matters is of six years; and in some of these States, the discharge of indebtedness under the Statutes of Limitations of foreign nations is not recognized; and we may at once suppose the case of a Lower Canadian removing to any of those countries, immediately after his liability on negotiable paper is terminated here by a prescription of five years. He would, therefore, notwithstanding his discharge here, remain liable to an action there, where the *lex fori* is the exclusive rule. This would be a more *déplorable conséquence* than that pointed out by Savigny and Massé: it would be nothing less than a public inconvenience, and would be contrary to the policy of any commercial nation.

In the third place, what are the grounds of objection urged by Mr. Bateman, the American champion of the *lex loci contractûs*? After admitting it to be well settled that the plea of limitations is a plea to the remedy, and consequently is governed by the *lex fori*, he makes this argument: "What is the essential or necessary difference between a discharge of the obligation of the contract, and a bar of the remedy upon it? In what manner are they related to each other? It is of the essence of the obligation that it shall be enforced of moral obligation, that it shall be enforced by moral means; of legal or civil obligation, that it shall be enforced by such means as are given to courts of justice for that purpose. The exact relation of the obligation and the remedy to enforce it, then, is that of an end to be attained and the means of attaining it; not that of an end to be attained, and the means of preventing its attainment." \*

Granting this to be so, as to the country where the contract is made; is it to be inferred that every other country is bound to do likewise, even in opposition to its laws of public order and policy? It is chiefly because prescription is a law of public order and policy, that the *lex fori* should govern.

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\* Commercial Law, p. 105, § 143 *et seq.*

The maxim of the Roman law was *Interest reipublice ut sit finis litium*, and it has been recognized by the jurisprudence of modern nations.

"Les prescriptions," observes Domat,\* "ont été établies pour le bien public," and elsewhere he says, "afin de mettre en repos ceux qu'on voudrait inquiéter." †

Blackstone ‡: "The use of these statutes of limitations is to preserve the peace of the kingdom."

Angell ||: "They are statutes, as has often been asserted by courts of justice, *of repose*. Without it, a right might travel for a very long period, in direct contravention of the intent and principles of these statutes. As has been asserted by Lord Eldon, in respect to real actions, it might travel through minorities for centuries."

Story §: "They go *ad litem extinguendam*, and not *ad litem decidendam*, in a just juridical sense. The object of them is to fix certain periods within which all suits shall be brought in the Courts of a State, whether they are brought by or against subjects, or by or against foreigners. And there can be no just reason and no sound policy in allowing higher or more extensive privileges to foreigners than are allowed to subjects. Laws thus limiting suits are founded in the wisest policy. They are statutes of repose to quiet titles, to suppress frauds and to supply the deficiency of proofs arising from the ambiguity and obscurity or the antiquity of transactions. They proceed upon the presumption that claims are extinguished or ought to be held extinguished, whenever they are not brought in the proper time within the prescribed period. They take away all solid grounds of complaint, because they rest on the negligence or lapses of the party himself. They provide diligence by making it in some measure obligatory on rights. They discourage litigation by bringing in one summary recognition of the accommodations of past times which are extinguished, and have now their lapse of time become necessities. It has been said by John Van with singular ability, that prescriptions are limited to a fixed period of

\* Domat, *des Loix*, liv. 1, tit. 1, § 1.  
 † Domat, *des Loix*, liv. 1, tit. 1, § 1.  
 ‡ Blackstone, *Commentaries*, 4th ed., vol. 4, p. 345.  
 || Angell, *op. cit.*, p. 345.  
 § Story, *op. cit.*, p. 345.



time, lest they should be immortal, while men are mortal: *Ne autem lites immortales essent, dum litigantes mortales sunt.*"

Again (§ 578): "But if the question were entirely new, it would be difficult upon principles of international justice or policy to establish a different rule. Every nation must have a right to settle for itself the times, modes and circumstances, within and under which suits shall be litigated in its own Courts. There can be no pretence to say that foreigners are entitled to crowd the tribunals of any nation with suits of their own, which are stale and antiquated, to the exclusion of the common administration of justice between its own subjects. As little right can foreigners have to insist that the times and modes of proceeding in suits, provided by the laws of their own country, shall supersede those of the nation in which they have chosen to litigate their controversies, or in whose tribunals they are properly parties to any suit."

"A person," said Lord Tenterden, "suing in this country, must take the law as he finds it: he cannot by virtue of any regulation of his own country enjoy greater advantages than other suiters." \*

Laurent,† "Il va sans dire que les lois qui règlent la procédure sont applicables aux étrangers, car elles sont de droit public. C'est pour la même raison, à notre avis, que les lois sur la prescription sont des lois réelles auxquelles les étrangers sont soumis comme les citoyens. Quand il s'agit de l'usucapion, l'intérêt public est évident; la loi sacrifie le droit du propriétaire au droit du possesseur, parce que le droit du possesseur se confond avec le droit de la société, qui demande la sûreté et la stabilité des propriétés. Quand à l'usucapion des meubles, elle s'accomplit, instantanément par application du principe qu'en fait de meubles possession vaut titre. C'est l'intérêt du commerce qui a fait établir ce principe, par conséquent un intérêt social. D'où suit que l'étranger y est soumis comme l'indigène. Il en est de même de la prescription extinctive. *La prescription met fin aux procès: voilà un intérêt social qui domine tous les intérêts individuels.*"

Before closing, we will briefly refer to the articles of the Civil Code of Lower Canada, which have settled the question for the future. Still as foreign notes due and payable before the coming

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\* *De la Vega v. Vianna.*

\* *Principes du Droit Civil* 1869, vol. 1, p. 200.

into force of the Code (1866) can be sued in this province so long as the debtor is absent from the foreign country and his whereabouts remain unknown to his creditor, the question is and will be for years to come of great practical importance.

The Civil Code of Lower Canada has combined several systems; it admits:

1. Foreign prescription fully acquired in the foreign country, provided the obligation be not contracted nor made payable in Lower Canada.
2. Canadian prescription fully acquired in Lower Canada, provided the debt be contracted or made payable, or the defendant, at the time of the maturity of the debt, or during the whole currency of the Canadian prescription, be domiciled in Lower Canada.
3. Prescription resulting from the union of successive periods of time elapsed abroad and in Lower Canada.

The articles of the Code are worded as follows:

"As regards moveable property and personal actions, even in matters of bills of exchange and promissory notes and commercial matters in general, one or more of the following prescriptions may be invoked.

"1. Any prescription entirely acquired under a foreign law, when the cause of action did not arise or the debt was not stipulated to be paid in Lower Canada, and such prescription has been so acquired before the possessor or the debtor had his domicile therein.

"2. Any prescription entirely acquired in Lower Canada, reckoning from the date of the maturity of the obligation when the cause of action arose, or the debt was stipulated to be paid therein, or the debtor had his domicile therein, at the time of such maturity: and in other cases from the time when the debtor or possessor becomes domiciled therein.

"3. Any prescription resulting from the lapse of successive periods in the cases of the two preceding paragraphs, when the first period elapsed under the foreign law. Art. 2190.

"Prescriptions commenced according to the law of Lower Canada are completed according to the same law, without prejudice to the right of invoking those acquired previously under a foreign law, or by a union of periods under both laws, conformably to the preceding article. Art. 1191.

From the foregoing remarks, the following conclusions may be drawn:

1. Under both the French and English common law, absence or any other disability is not a cause of interruption of commercial and other like short prescriptions.

2. Statutes of limitations are laws of public order and policy.

3. They do not admit exemptions unless therein expressly made. \*

4. Prescription affects not the contract but the remedy.

5. In cases of conflict of prescriptions of personal actions, the prescriptive laws of the country, where they are instituted, should prevail.

6. In every country where the English statutes of limitations are in force, as in Lower Canada, cases are not governed by the *lex loci contractus* but by the *lex fori*.

D. GIROUARD.

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\* Since the above article was sent to press, the 21st volume of the *Annual Louisiana Reports* reached us, containing a very elaborate decision upon the question of interruption of commercial prescription in the case of *Smith v. Stewart*, in which case the Supreme Court of the State of Louisiana held: 1. That prescription runs against all persons except such as are included in some exceptions established by law; and that the existence of war not being among the exceptions established by law, will not work an interruption or suspension of prescription. 2. That *the inability to sue will not avail against the plea of prescription, except in the cases specially excepted by law*. 3. That the maxim *contra non valentem agere non currit prescriptio*, has no application under the system of jurisprudence of Louisiana. 4. That where the Legislature has prescribed rules regulating prescription, and enumerated the causes that interrupt or suspend prescription, the courts will admit no other exceptions. This decision was not only rendered unanimously; but two of the honourable judges, Messrs. Taliaferro and Howell, had on a former occasion arrived at quite the opposite conclusion. See also *Jackson v. Yoist*, 21 A, 108; *Bartley v. Bosworth*, 21 id. 126; *Nelson v. Scott*, 21 id. 203, 626; *Rabel v. Bourciau*, 20 id. 131; *Hatch v. Gilmore*, 3 id. 510; Walker's Louisiana Dig. vo. Prescription, 363; *McElmoyle v. Cohen*, 18 Peters, 327; *Bank of the State of Alabama v. Dalton*, 9 Howard, 250; *Troup v. Smith*, 20 Johns 33; Marcadé on art. 2251; Duranton, Nos. 285, 286.

D. G.

## THE LAWS OF LOUISIANA AND THEIR SOURCES.

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The chairman of each section of the Academy is required by a resolution to read a paper on the branches of science submitted to such section. This resolution imposes upon me the duty of reading a paper on either law or political economy.

It is a maxim that all men are presumed to know the law, and that ignorance of the law excuseth no man. This maxim is well enough as it respects offences *malum in se* and such questions of right and wrong as one's conscience settles, without any elaborate appeal to reason. But when we come to consider regulations which are made merely for convenience, or questions which require the cautious weighing of reasons by the cultivated mind to arrive at what is just, the propriety of the maxim is by no means so clear; yet it is essential to administration of justice.

It has occurred to me that of the subjects at my disposal, a few observations on *the laws of Louisiana and their sources* would be probably the most useful and interesting, and contribute in a slight degree perhaps to awaken a greater interest in our laws, and tend to diminish the distance between the fact and the presumption, contained in the maxim.

It is well known that the laws of Spain were the laws of Louisiana at the cession of the territory to the United States in 1803, by the treaty of Paris.

It is true, the country had been settled by the French in 1699, and had continued in the possession of France for seventy years, when O'Riley took possession of the same in 1769 for Spain, and that the larger part of the inhabitants were of French descent, and that the country had been retroceded to France by the treaty of Ildefonso in 1800, and by that power transferred to the United States, yet the brief possession *de facto* by France from the 30th

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day of November, A. D. 1803, to the 20th of December of the same year, did not permit the carrying into effect of any material changes in the laws. The only changes made by Lausat, acting for France, was to substitute a Mayor and Council for the government of New Orleans in the place of the Cabildo, and to re-establish the black code of Louis XV, prescribing the duties toward and the government of slaves. But as Spain and her Indies were governed by the civil law, which also prevailed in France and Louisiana, the change was not so marked so far as private rights were concerned as it was respecting the parceling out of the public domain, and laws affecting the public order and the substitution of the Spanish language for the French in legal proceedings. It is quite apparent that the Spanish laws were acceptable to the inhabitants, for no attempt was made to change them after the cession, further than was operated by subjecting the country to the authority and Constitution of the United States. So that at this time, Louisiana is the only State of the vast territories acquired from France, Spain and Mexico, in which the civil law has been retained, and forms a large portion of the jurisprudence of the State. The Treaty of Paris guaranteed to all the inhabitants of Louisiana, then embracing the immense territory from the Gulf to the forty-ninth parallel of latitude, and from the Mississippi River to the Rocky Mountains, all the rights, advantages and immunities of citizens of the United States, and protected them in the enjoyment of their liberty, property and religion. As in matters of treaties, the President and Senate of the United States possess the supreme power, no steps were needed to naturalize the inhabitants of the territory, how short soever the residence in it had been at the time of the cession. They became at once citizens of the United States.

The first government provided for the ceded territory by our Government was exceedingly simple: Congress, in advance of the transfer on the 31st October, 1803, provided that until the expiration of that session of Congress (unless provision for the temporary government should be sooner made) all the *military, civil and judicial* powers exercised by the officers of the existing government of the same, should be vested in such person or persons, and should be exercised in such manner as the President of the United States should direct for maintaining and protecting the inhabitants of Louisiana in the free enjoyment of their liberty, property, and religion.

It was not long, however, before the principal part of the present State of Louisiana was organized into a territorial government under the name of the territory of Orleans. I say principal part, because although the terms of the law embraced within the territorial limits that part of the State between the Mississippi River and Pearl River, and between the Mississippi territory and the Manchac or River Iberville, this part of the territory was at that time actually held by Spain, and continued to be so held until 1810. The legislative power of the territory of Orleans, by the act of Congress of March 22, 1804, was vested in the Governor, appointed by the President, and in thirteen of the most fit and discreet persons of the territory, who were to be appointed annually by the President. The ancient laws were continued in force until repealed or modified by the Legislature. In March, 1805, Congress reorganized the territorial government, by authorizing the President to establish a government similar to that exercised in Mississippi Territory, which had been created by adopting the same government as that organized under the celebrated ordinance of 1787, for the government of the territory of the United States, northwest of the river Ohio, excluding the last article of the ordinance which prohibited slavery. Therefore to know what law governed the territory, recourse was had to the ordinance of 1787.

As was to be expected, the first changes made in the laws of Louisiana were in relation to crimes and offences, which could, in a country having no immemorial usages, exist only by virtue of statute law, and which were introduced in language and terms known to the laws of England; and in the act of the 4th of May, 1805, the following provision was adopted, viz.: "All the crimes, offences and misdemeanors hereinbefore named, shall be taken, intended, and construed according to and in conformity with the common law of England, and the forms of indictment (divested, however, of unnecessary prolixity), the method of trial, the rules of evidence, and all other proceedings whatsoever in the prosecution of said crimes, offences and misdemeanors, changing what ought to be changed, shall be (except by this act otherwise provided for) according to said common law."

The crimes and offences referred to in the section comprised the principal offences known to our law, so that at the present time the section of the statute of 1805 is deemed to be applicable to all crimes and offences. Standing as it has done on the statute

book from 1805 to the present time, without modification or change, in the midst of the various schemes for the revision of our statute laws, it has had a marked influence upon the criminal jurisprudence of Louisiana. It has given stability to that jurisprudence, since the inquiry of our judges was limited to the common law as it stood at the time of the passage of the act. They were not bound to follow the common law of England, as it became modified by adapting itself to the changes introduced by statutory law of England, but they were to look to a single standard, viz. the common law of 1805. This venerable provision was re-enacted for the first time in 1870, but at the same time in the last section of the revised statute it is excepted from repeal. The common law of England, ever pliant, and bending itself to the gradual changes wrought by the improvements in science, the arts, manufactures and commerce, and by the modified habits of the people, has never been precisely the same from age to age. Hence the modern English authorities, whenever overruling the standard works on the criminal law of the period of 1805, have not been regarded as of binding authority.

The next important measure affecting the civil laws was the codification of the civil law of the territory. A great misapprehension exists in the minds of many in regard to the Civil Code of Louisiana. It is supposed to be but a re-enactment of the Napoleon Code. It is true the French code preceded our code of 1808 by five years, and a *projet* of it (for the Napoleon Code, as adopted, had not reached the territory) may have suggested to our legislators the necessity of reducing the laws, which were in the Spanish language, a tongue foreign to the largest portion of the citizens of Louisiana—Americans, or those who were of French descent—into a single code, which should be published in French and English.

In June, 1806, the Legislature, by a resolution, appointed two prominent lawyers, James Brown and Moreau Lislet, to compile and prepare a civil code, and they were expressly instructed by the legislature "to make the civil law by which this territory" was then "governed, the groundwork of said code," in other words, to make the Spanish law the groundwork of the code. On the 31st of March, 1808, the old code was adopted, declaring merely an abrogation of the ancient laws, wherever the same were contrary to that code, or irreconcilable with it. The effect of this provision was to leave all the Spanish laws not irreconcilable with the code

in force, and they continued to be quoted and acted on in the courts untill 1828, when by one sweeping clause in the statute of 25th of March, known to lawyers as the great repealing act, all the civil laws which were in force before the promulgation of the civil code then lately promulgated, were repealed. If it was the intention of the Legislature to prevent reference to foreign systems of law, principles, maxims and rules for the exposition and interpretation of our own, and to confine our courts to the meagre provisions of the civil code and of statutory law for all rules of right and justice, it was a mistaken labor. The Legislature might as well attempt to repeal and abrogate the language of its people and the rules of logic, as to prevent the lawyer from recurring to the ancient principles and maxims of the law as well as its history, in order to ascertain its meaning. The enactment of a law whether organic, as in the case of constitutions, or legislative, presupposes the existence of rules of interpretation. And so it has happened that the ancient laws are still examined, not only as reflecting light upon those remaining, but also as furnishing the great store-house of equitable maxima for the decision of cases not foreseen by the lawgivers. The ancient laws and maxims teach us what is equitable and just.

By resolution of the Legislature, passed the 14th of March, 1822, Messrs. Livingston, Derbigny [and Moreau Lislet were appointed on joint ballot, to revise the civil code of 1808, by amending it in such a manner as they should deem advisable, and by adding thereto such laws as were still in force and not included therein. These jurists, among whom the last named was not the least, reported their proposed amendments of the code to the Legislature, and the articles of the old code and the amendments were numbered continuously, and on the 12th of April, 1824, they were approved by the Legislature, and went into operation in 1825; in the city of New Orleans, the 20th day of May, 1825, the day of its promulgation.

There are very many articles in the civil code of 1808, and as amended in 1825 and continued by the recent revision of 1870, which are identical with articles in the Napoleon code, and lead to the supposition that whenever the compilers of the code of 1808 found an article in the *projet* of the French code, which fully expressed the sense and meaning of a provision of the law of Louisiana, it was appropriated. In other instances, the French text was amended to conform to our law and so adopted.



In others, the Spanish law was first written in French and translated into English. Nevertheless, the laws of Louisiana, where differing from the Napoleon code, have been preserved, and thus the civil code contains some provisions in sharp contrast with the Napoleon code. The Napoleon code has 2281 articles; ours has 3556, and that of 1825 had 3522 articles.

When the code of 1808 was enacted, laws were passed in French and English. The government being territorial, there was no constitutional provision requiring the laws to be passed in the English language. Hence the French text of the articles found in code of 1808, and still retained, have been held to be of equal force with the English articles, and have been resorted to by the courts to prevent the evils which might flow from a bad translation.

Although Spanish law has been the law of the land, and our courts take judicial knowledge of the same without proof, and although the French laws are esteemed foreign laws which require to be proven when brought in controversy in our courts, yet the similarity of the French text of our late codes to the Napoleon code has been so great, that commentators on the French code, as well as the decisions of the Court of Cassation, have exercised great influence on controversies arising under our own code. Perhaps one reason has been that we have no commentaries of our own further than some annotated codes, and a work on criminal law and digests of the decisions of the courts, owing to the limited sale which has followed all similar publications. Hence French authors are an essential part of a lawyer's library.

The practice of the State courts of Louisiana up to September, 1825, when the Code of Practice, prepared under the resolution of 1822, approved April, 1824, went into effect, was regulated by the act of 1805 (which was based on the Spanish laws) and amendments thereto. The Code of Practice itself was written by its compilers in the French language, and many of its articles are badly translated. It has recently (1870) been revised, by incorporating some amendments (which have from time to time been enacted) into the body of the work. It has not been materially changed in other respects, and the numbers of the articles remain the same.

We notice some efforts now being made to introduce further amendments in order to lessen the present heavy costs of litigation which drives suitors from the courts of justice. Some change is certainly very desirable, not so much to amend, as enforce the law

respecting costs. When we consider how extensive the litigation is which arises from the adoption by the Legislature of a new system of practice, it should admonish us to modify with some caution. It took twenty years to settle the Practice Act of 1805, and since 1825 our courts have had much of their time occupied in ascertaining the meaning of the Code of Practice. The experiments in our sister States in adopting codes of procedure have also given rise to a great deal of litigation. Hence it would seem that if any change was to be introduced, it could best be done by way of amendments to the present system. It may also be observed that the new codes of procedure are rather imitations of our Code of Practice than otherwise. The preparation of the pleadings by the attorneys in New York is, I think, but a continuation of the ancient practice in that State of making up the rolls by the attorneys. The attempts of the Legislature to codify the other branches of the law failed.

A *projet* of a commercial code was prepared under the resolution of 1822, but fortunately never was adopted. It would be extremely unsatisfactory for a single State of the Union to adopt a system of commercial law which should sometimes come in conflict with the commercial law of the neighbouring States, as settled by their courts, and in conflict with the law as settled by the courts of the nation. As it is, the courts being free to act, have gracefully yielded on questions of commercial law to the customs of merchants and the rules settled under the common law and in our sister States, so that the whole body of the commercial law governing this Union is, in the main, moulded into a harmonious whole. As it had been formed upon the custom of merchants, engrafted upon the common law, the decisions in England were generally looked to with great respect, and what is commercial law in London is commercial law in Washington, as well as among most commercial nations.

A like attempt was made to reduce the criminal law and criminal proceedings to a simple code in 1820. In 1821, Edward Livingston was elected by ballot of the General Assembly to draft a criminal code. Livingston prepared and presented to the Legislature a system comprising "a code of crimes and punishments, a code of procedure, a code of evidence, a code of reform and prison discipline, and a book of definitions." This constituted the celebrated Livingston code, a work more famed abroad than at home—a work noted for its scientific description

of crimes and offences, and of the proceedings devised for the trial, prison discipline and punishment of offenders and their reformation. The *projet* never having become a law, has left the world unenlightened as to what would have been its practical operation. Being based upon the common law, which Livingston sought to simplify, much of it would doubtless have worked well, but like all unbending legislative provisions regulating the details of practice, it would have taken years of discussion before the courts to settle its meaning. As it was, scarcely a question could be raised under the criminal law which had not been previously decided by some binding decision.

The Legislature of 1855 attempted to revise the statutes of the State, and adopted the hazardous experiment of annexing to each statute a clause, not only repealing all laws contrary to the provisions of each act revised, but all laws on the same subject matter, except what was contained in the Civil Code and Code of Practice. There being no saving clause except as to the act relating to crimes and offences, an adherence to the language of the statutes would have occasioned the overthrow of offices and the loss of rights. It forced the courts to depart from the letter of the law in order to ascertain its meaning and prevent an evil which the lawgivers had not foreseen.

In the recent revised statutes the Legislature has repeated the same experiment, without even a saving clause as to crimes and offences, and again forced the courts to interpret so as to prevent great evils. The revised statutes of 1870 are comprised in 3990 sections, and contain the matters of the revised statutes of 1856, and the recent amendments.

Having thus hastily glanced at some of the prominent points in our legislation, we will look for a moment into the courts in session in our midst, and take a practical view of the laws enforced in them. We shall find that the courts of the United States have jurisdiction of cases—

- 1st. In admiralty.
- 2d. In bankruptcy, patents and copyrights; and
- 3d. Of revenue and prize cases, offences against the United States, and other causes in which the United States Government is interested as a plaintiff, and concurrent jurisdiction with the State courts.
- 4th. Of all causes in which a citizen of another State is plaintiff or defendant, and the other party is citizen of the State, and of cases in which an alien is a party.

We shall find that the State courts have exclusive jurisdiction of crimes and offences against the State, of probate matters, of all controversies between citizens of the State, whether it respects their property or *status*, or obligations arising from wrongs done to them by others. And they have concurrent jurisdiction with the courts of the United States on all these questions when an alien or citizen of another State submits himself to the jurisdiction of the State courts, or when sued, does not avail himself of the right which he has to remove his cause to the courts of the United States.

If we now regard the mode of proceeding in the different courts we shall find it very dissimilar, and in a few particulars, resting upon principles directly the opposite of each other; for example, if your ship has been damaged by collision, on navigable waters, and the party who was instrumental in occasioning the damage is within the reach of process of the court, you have your choice, to proceed against such party on the law side of the State or Federal courts, according to the citizenship of the party, or to bring your action in admiralty *in rem* or against the person. If you sue on the law side of the courts you must take care that neither you nor your agents controlling the ship have been in fault. For the courts of law deriving their rules from a rigid morality, inform you that they do not sit to balance negligences, faults and wrongs; that whoever comes before them must come with pure hands. Their maxim is, *procul, O procul este profani*, and the suitor who has been partly in the wrong is sent away without redress, however much he may have been damaged, and how much greater soever may be the fault of the other party.

The courts of admiralty looking at human actions in a more benevolent light and with a juster appreciation of the conduct of men in times of danger and excitement, consider the faults and negligence of both parties, and where both are in fault estimate the loss of both vessels, and divide the loss between the parties, and grant relief where in a court of law it would be refused.

The proceedings in admiralty are of civil law origin, and many of the principles governing the court of very great antiquity. They can be read back to the Greeks before the Christian era from whence they were received into the Roman jurisprudence.

The jurisdiction of the courts of admiralty is exclusive whenever the proceeding is *in rem*, that is, against the vessel or other thing not subject of maritime jurisdiction. If, however, at the

same time persons can be found and service made upon them by arrest, which is still allowed as citation, and the matter to be brought to the consideration of the court, is one for which the common law gave a remedy, the courts of ordinary jurisdiction have concurrent jurisdiction *in personam*, and may decree compensation and damages as in other cases. But if the ship or vessel is the object of pursuit, and the same is to be taken into the custody of the law and made responsible for liens and privileges in ordinary cases, civil and maritime, including spoliation, civil and maritime or prize cases, the district courts of the United States alone have jurisdiction, and any judgment pronounced in a proceeding *in rem* in the highest court in the State where the same can be rendered, if that court be but a justice of the peace, in an unappealable case, can be carried before the Supreme Court at Washington, where it is sure to be reversed; that court zealously protecting the jurisdiction of the Federal courts over such cases.

In admiralty personal qualities are in effect attributed to matter, so that it is the ship, vessel, or other thing which is supposed to have offended in prize cases, and in ordinary civil cases it is the ship or vessel which owes the duty or lien, as well as the captain and owners, and all persons interested are admitted in the process *in rem* as claimants, and the thing is treated as a real defendant. Revenue cases are in some respects assimilated to the above, although not belonging to the admiralty jurisdiction.

The proceedings are commenced by a libel, (*libellus*, a little book,) in which the plaintiff, through his lawyer, called a *proctor*, alleges and articulately *propounds*, in a series of numbered propositions the grounds of his complaint, to be specifically answered by the defendant, or by whoever comes into the case as claimant, if the proceeding be *in rem*. If either party give a bond for property, etc., he borrows a term from this, a solemn form of the civil law, and calls it a stipulation.

The Constitution of the United States conferred upon the courts of the Union exclusive jurisdiction in admiralty. In England this jurisdiction extended to tide waters only. At the commencement of the Government, giving the language the signification it then bore, it was supposed the power conferred only extended to tide waters, and so it was decided by the Supreme Court of the United States. The jurisdiction in the case of *Warring et al, vs. Clarke*, 5 Howard's Rep., 44, decided in 1847, for a collision between the steamboats *Luda* and *De Soto*, was maintained by proving that

there was a preceptible tide extending up the Mississippi river as high as Bayou Sara.

Since that period the Supreme Court of the United States, notwithstanding the earnest dissent of some of its members, has, as it always happens when convenience and expediency demand a chance, extended the admiralty jurisdiction over the lake and all rivers navigable by vessels of ten tons burthen and upwards. The simple and speedy proceedings in the courts of admiralty make that court a great favorite with many, while others think they see the tendency in the national courts to engross jurisdiction, which may lead to greater evils in the end than the present good attained by decisions, which they think overstep the limits of the Constitution as understood by those who framed it. The Constitution of the United States also confers upon Congress power to pass uniform rules of bankruptcy. It is a principle governing many of the provisions of the Constitution of the United States, that they are inoperative until Congress has passed some law to carry the provision of the Constitution into effect. Thus the Constitution gives the Courts of the United States the right to take jurisdiction of controversies between citizens of different States, between aliens and citizens, and as it respects the grants of lands made by different States, etc. But the Courts of the United States hold that they cannot take cognizance of such controversies without an act of Congress to carry the provisions of the Constitution into effect. Hence the individual States have power to pass and enforce insolvent and bankrupt laws when no act of Congress is in force on the subject. Since the formation of the Federal Government bankrupt laws have been passed between long intervals and following commercial disasters, on three occasions, viz., April 4, 1800, repealed in 1803; and 19th of August, 1841, repealed 3rd of March, 1843, and that of 1867, still in force and which is probably intended to be perpetual.

The insolvent laws of Louisiana, now dormant by reason of the act of Congress, are of Roman origin.

Under the law in the period of the twelve tables, the borrower of money or debtor could deliver himself, his family and effects, into the hands of his creditor, and became bound to him *nezu rinctus*. He was only released on payment of the debt by himself or by another for him. If he failed to pay, he was adjudged to the creditor with all his property. In other cases, after certain publications and delays, the debtor was adjudged (*addictus*) to

the creditors, who could slay him, or sell him as a slave beyond the Tibor. If there were several creditors, the twelve tables ordained that he should be cut in pieces *and fairly divided* among the creditors; which probably meant a division of the price of the debtor, after he and his goods were sold. As the *pater familias* had the power of life and death over his children and grandchildren, of whatever age they might be, as well as over his slaves, this provision of the twelve tables does not seem so extraordinary.

After the preceding provision was abolished, there was a period of the Roman law, in which the debtor's goods were sold in mass (*per universitatem*), and the vendee succeeded *actively* and *passively* to the effects and debts of the insolvent, and was bound to pay the price to the creditors *pro rata*. Hence, as the debtor had an universal successor, he was discharged from the debt. The benefit of the cession of goods, as it now exists in our law, had its origin in the time of Julius or Augustus Cæsar. Where the cession was made under the law Julia, (*ex lege Julia*), the debtor enjoyed the right to the *beneficium competentiæ*, which is a point of difference between the bankrupt laws and our own, the *cessio bonorum*.

A man may commit an act of bankruptcy and be forced into court without being insolvent. Under the State law he cannot be forced into insolvency so long as he has effects to meet executions. The bankrupt laws discharge the debtor absolutely from the debt. The *cessio bonorum* does not relieve the debtor absolutely from his obligations, but if he comes to a fortune subsequently to his surrender, he can be compelled to make a second surrender; but he is entitled to retain for his own use a competency; that is the *beneficium competentiæ* just mentioned. The insolvent laws of Louisiana, in common with the bankrupt laws of the individual States, did not discharge the debtor from his obligation due the citizens of the other States, and only barred the obligation due citizens of the same State. Where contracts are entered into during the existence of a bankrupt law, there can be no question of the right of the courts (considered as a question of morals) to discharge the debtor. The right is a condition making a part of the contract. The debtor could say to his creditor: "When I bound myself to pay you a sum of money, it was with the understanding that if by misfortune I should become embarrassed, that I should be discharged from the debt by surrendering to you and my other creditors all of my effects. You

took my obligation, knowing that the law which was a part of the contract gave me this right, and you are bound by the contract." But where the bankrupt law is passed after the debt was contracted, the right to discharge the debtor is not quite so apparent, since it is a fundamental principle of our law that the States cannot impair the obligation of contracts.

The property of enacting bankrupt laws by the sovereign power, depends upon the weighing of the propositions whether it is better that some persons should suffer inconvenience on account of the incautious use of credit, as an example to deter others and prevent the like occurrences, and the advantage which the State will derive from the free and untrammelled industry of all its citizens, particularly where many are embarrassed, coupled with the drawback that the bankrupt laws are frequently made the means of screening the money and effects of a fraudulent debtor from the pursuit of his creditors.

The insolvent, oppressed with debt, is incapable of engaging in new business and occupation. Freed from the overwhelming burden, he engages again in useful employments with spirit and zeal, and becomes a wealth producer and a valuable citizen to the State.

In 1824 Congress passed a law adopting for the practice of the Federal courts in this State the rules of proceeding of the State courts. At this time, as already shown, the *Code of Practice* was not adopted. But the rules of proceeding under the practice acts were very similar to those prescribed by the Code of Practice. A large number of the Bar were of the opinion that the broad terms of the act of Congress of 1824 introduced into the Federal courts the State practice in all cases and to the exclusion of proceedings on the equity side of the court, according to the forms common in the other States. After a strenuous contest it was finally settled, that the courts of the United States had equity jurisdiction according to the ancient forms, and all causes proper for the consideration of the chancellor are required to be brought on the equity side of the court: that is, they must be brought according to the rules of the practice in chancery; and these rules are uniform throughout the United States, while the law side of the Federal courts is governed by the laws of the individual States to the same extent as the State courts in ordinary affairs.

There are great misapprehensions as to the meaning of the term equity or chancery. It will surprise some to be told that proceedings in equity are governed by laws as well known and as faith-



fully carried out as those upon the statute book, and after all that it is nothing more than a mode of rendering justice and granting relief in a different manner, concurrently with, or in a different class of cases from those relievable at law.

In every system of laws there must arise a state of facts with which courts of justice are required to deal, not contemplated by the law-giver, nor provided for by him, or if within the express letter of some broad provision which he has laid down, yet of such a character that to carry the provision into effect, would shock that innate sense of justice implanted in the bosom of every one, and such considerations would leave no doubt that the law-giver never intended the provision in question to govern the particular case. In the first example the courts find rules of decisions from the equitable maxims which are supposed to be the foundation of all laws; in the other, the courts interpret according to rules of equity and the general intent or scope on other laws or like subjects, and endeavor to arrive at the true spirit and meaning of the law, and exclude from the broad words of the law what was not the intention of the lawyers to embrace in them. For, as St. Paul has it, "the letter killeth but the spirit giveth life." If, from some forgotten statute, or from time immemorial, the practice of the courts of law has been confined to a set of *formulas*, there will arise a condition of things not contemplated in former ages, and a class of wrongs which these *formulas* are insufficient to redress. Precisely this condition of affairs did arise under the *jure civile* in the Roman law. which was remedied by the jurisdiction which the *proctor* assumed or amplified when he established the *jus honorarium*, and allowed petitions to be addressed directly to him in extraordinary cases, and in England, where the Chancellor assumed jurisdiction of those cases in which there was no adequate redress at law. In the latter country (as in the former in ancient time) proceedings on the law side of the courts were regulated according to certain strict forms, and relief could not be afforded in any other manner. In the action of *assumpsit*, for example, a judgment could only be rendered for damages; in debt that the defendant recover his debt and damages; in covenant even to convey land, the judgment is that plaintiff recover his damages, and so of the other actions. It was found in very many cases that the relief granted by the courts at law was wholly inadequate to the injury. The Chancellor of England gradually assumed jurisdiction over this class of cases and uncontrolled by *formulas* rendered

his decree according to the right of the case. If the defendant had contracted to sell to the plaintiff a tract of land, while a court of law could only in the action of *assumpsit* or *covenant* give judgment for damages, the Chancellor, meeting the very equity of the case, ordered the defendant to make title and to account for the revenues, and compelled obedience to his decrees by proceedings known to his court.

The kind of jurisdiction assumed by courts of equity, may be illustrated by an example from the statute of frauds and perjuries passed in England in 1677, and adopted in some form or another in most of our sister States. By this act, among other things, it was provided that no action should be brought upon any contract for the sale of lands, unless the agreement or some memorandum or note thereof should be in writing and signed by the party to be charged therewith.

Now it sometimes happens that verbal contracts are made and partially performed, as for example the intended purchaser who paid part of the price and has been put in possession. By the strict letter of the statute the vendee would be defeated in his action upon the verbal contract. But a court of equity viewing the statute as made for the purpose of preventing fraud, comes to the relief of the purchaser, on the ground that to allow the vendor to avail himself of his advantage would be to encourage one of the mischiefs which the legislature intended to prevent. It compels him to answer plaintiff's complaint under oath, and decrees a specific performance. Under our State law, where equity and law are administered together, the like relief is only granted where the defendant admits the contract under oath, and possession has been delivered the vendee. Equity, among other things, grants relief in the following cases, viz: suits for the specific performance of contracts for the sale of real estate; to foreclose or redeem mortgages; to stay waste of lands; to enforce trusts; to relieve against fraud and enjoin parties against enforcing judgments of courts at law where obtained by fraud; to compel a party to answer under oath, in order that the replies of defendant, or the documents, where any are disclosed as existing, may be used as evidence in suits at law; to settle long and intricate accounts; to marshal securities; to settle boundaries; to correct mistakes in contracts; to relieve, in some cases, against penalties and forfeitures, and to protect the rights of married women, minors, etc. It is thus seen from the examples given

that equity embraces a very considerable proportion of jurisprudence, and as it is governed by principles of its own, it is easy to see that in many instances it may come in conflict with the State laws. For if citizenship gives the United States courts jurisdiction, and the case be one of exclusive equity jurisdiction, and should be brought in the United States courts, it will not be heard, except on the equity side and according to the rules in equity, no matter what is the State practice in the same case.

The practice on the law side of the courts of the United States sitting in Louisiana in civil cases, is governed by the practice of the State, which practice was adopted in 1824 by the act of Congress for the Federal courts, as stated above.

Criminal proceedings, both in the courts of the United States and the State courts, are conducted, as already shown, according to the forms of the common law.

Without adverting to their more remote origin, the following branches of law come to us with the forms with which they have been clothed, and the principles with which they are allied from England, viz :

Admiralty and matters of maritime jurisdiction ; the law and practice of courts of admiralty ; equity and the rules and practice of courts of chancery.

Bankruptcy ;

Criminal law and criminal proceedings, including warrants for arrest, indictments, informations, etc., although unlike the original States of this Union, we have no common law offences, and all crimes and misdemeanors are created by statutes.

Evidence, criminal and civil.

Commercial law, which in addition to maritime contracts just mentioned, among others, embraces promissory notes, bills of exchange, bank paper, checks, etc.

The great writ of habeas corpus.

And martial law, of which this city, since O'Reilly's entry, in 1769, has had large experience, both Spanish and American.

The law relative to the *status* of persons, domicil, minority, emancipation including the *venia ætatis*, corporations, (*universitates*), donations, testaments, dotal rights and property, the contract of sale, exchange, letting and hiring, including leases, loan to use, loan for consumption, partnership, mandate, suretyship, annuities and rents, the aleatory contracts, pawns and pledges, antichresis, privileges, mortgages, usucaption, prescription, the

discharge of debts by novation, compensation, payment with subrogation, release, or acceptilation, and the effect of notarial acts, are from the civil law.

The law respecting the community of acquets and gains is no doubt of German origin. It prevailed in certain provinces of Spain, as for example in Grenada and Salamanca, while other provinces like the South of France, were governed by the dotal regime, called the written law. The community of acquets and gains prevailed in the colony under the custom of Paris, from its first settlement, and it is stated by our excellent historian, Mr. Gayarrt, that it was a subject of complaint to the colonists at one time, that it was extended to the cases where colonists had married (with the forms of the Catholic church) Indian wives, who having less stable habits than the whites frequently absconded after the death of their husbands, with the personal effects, without paying the debts of the estate or settling up the same in due form. (The evil was corrected.)

One of the most marked peculiarities of the laws of Louisiana, as compared with the laws of the other States is this institution of the community of acquets and gains. It is more favourable to married women than any other system with which I am acquainted except the Spanish laws of the *Indeas*, from which it was, I think, immediately taken. By the custom of Paris and the Napoleon Code the personal effects of the wife, in the absence of a marriage contract, fall into the community. Under our law, in the same case, the personal effects remain the property of the wife, that is, they remain paraphernal.

The advantages of the institution are decidedly in favor of the wife. The husband cannot withdraw from the partnership, and he, the community, and his separate estates, are alike bound for the debts of the community as it respects third persons. The wife, on the other hand, can at its dissolution by death or divorce, withdraw from it without detriment to her separate estate, and where the affairs of the husband are embarrassed she can be declared separate in property from her husband by the courts, and sell under execution the community or his estates to reimburse herself for any property or money used by him in his business, and as the law gives her a mortgage for her security, she is always a formidable adversary to a creditor seeking to recover a debt even of the community. The income of the husband, (married without a marriage contract) from his own labor, and from

his separate property, falls into the community, without any ability on his part to prevent it. On the other hand, the wife has at all times the absolute right to withdraw from her husband, (by contributing one-half of the matrimonial expenses) her separate or paraphernal property, and to manage it herself, and reinvest the income thereof in her own name, and for her own use, and I know no law to prevent her also from sharing in the community at its dissolution.

The husband, it is true, is the head and master of the community during the existence of the marriage, and can dispose of the effects of the same at his pleasure and without his wife's sanction by onerous title, that is, for an equivalent; but if he conveys the same by gratuitous title, that is by gift or donation, his estates become responsible to the wife for the loss.

If prior to or at the marriage, the parties choose, they can settle property in what we call dower; the *dos* of the civil law. Property so settled cannot be sold by either husband or wife, or both, (except in one or two cases,) during the marriage, and thus the wife is assured of her estate at the termination of the marriage.

The provision prohibiting married women from binding themselves with or for their husbands is Spanish, and from the 61st law of Toro. The *senatus consultum Velleianum* had previously prohibited women from going surety for any one: *ne pro ullo foeminae intercederent*.

The marital fourth was given by the fifty-third and one hundred and seventeenth novels of Justinian.

The action of redhibition was given by the edict of the *ædiles*. The order of seizure and sale, to coin a word, that Rhadamanthine provision of our law where execution comes first and judgment afterward, is from the Spanish law.

The various pacts which supplied the defects of the *strict leges civiles* are of pretorian origin.

I have thus briefly, and therefore imperfectly glanced at some of the most striking features of our laws. It was my intention to have suggested some amendments which our present circumstances, in my opinion, seem to demand, but the length of this paper precludes the attempt and the subject must be left to others more competent, or reserved for a future occasion.

These laws, such as they are, and with their slight imperfections, are justly dear to the people of Louisiana. They have

protected and shielded the home and the fireside, the labours, the bargains and the acquisitions, the estates, and the persons of this people during all the growth of the State of Louisiana. The immigrant who has come here from the sterile hills of New England, from the more genial climes of the South, from the fertile fields of the West, as well as our ancient French, Spanish and German populations, have approved and blessed these laws. To those who would like to see the body of the common law introduced among us, we say, What have you of value in the common law? The trial by jury, the habeas corpus, known and defined crimes and offences, and enlightened rules of evidence? We have it all here and more: Your criminal law is ours; your commercial law also is ours. But we have also the most admirable provisions of the civil law filled with benevolence, equity and justice, to regulate our dealings and define our rights in our every day life. That our laws, like all others, may require amendments to make them more perfect, none will deny. Let us amend, but never change them for others, of which our people have no experience, and the adoption of which promises us no advantages in the future.

DEEDS OF COMPOSITION AND DISCHARGE BETWEEN COPARTNERS AND THEIR CREDITORS UNDER THE INSOLVENT ACT OF 1869.

The law of the Province of Quebec, as it existed previous to the time when the Insolvent Act of 1864 came into force, did not empower a majority in number or value of a trader's creditors to force a minority to accept in full discharge a percentage on their claims—the discharge of a debtor from liability in full, in consideration of a composition could only be effected by the consent of all his creditors. In trade, this provision of the law gave rise to great inconvenience, and begat in favour of recalcitrant creditors a system of fraudulent preference, pregnant with evil to the interests of commerce. The Insolvent Act of 1864 effected a change, but as its provisions are to a very great extent re-enacted in that of 1869, it is unnecessary to refer to them at greater length.

The subject of Composition and Discharge is treated of in fifteen sections of the Insolvent Act of 1869, beginning at § 94 and ending with § 108.

§ 94 is in the following words :

“A deed of composition and discharge, executed by the majority in number of those of the creditors of an Insolvent who are respectively creditors for sums of one hundred dollars and upwards, and who represent at least three-fourths in value of the liabilities of the Insolvent subject to be computed in ascertaining such proportion, shall have the same effect with regard to the remainder of his creditors, and be binding to the same extent upon him and upon them, as if they were also parties to it; and such a deed may be invoked, and acted upon under this Act although made either before, pending or after proceedings upon an assignment, or for the compulsory liquidation of the estate of the insolvent; the whole subject to the exceptions contained in section one hundred of this Act.”

This section is evidently borrowed from the 192 section of the English Bankruptcy Act of 1861, which reads as follows :

“192. Every deed or instrument made or entered into between a debtor and his creditors, or any of them, or a trustee on their

behalf relating to the debts or liabilities of the debtor, and his release therefrom, or the distribution, management and winding up of his estate, or any such matters, shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties to and had duly executed the same provided the following conditions be observed.

"1. A majority in number representing three-fourths in value of the creditors of such debtor, whose debts shall respectively amount to ten pounds and upwards, shall before or after the execution thereof by the debtor, in writing assent to, or approve of such deed or instrument."

There are six other conditions attached to the 192 section, but they have reference merely to procedure, so that it is unnecessary to set them out.

The similitude existing between the English Bankruptcy Act of 1861 and the Canadian Insolvent Act of 1869, does not end with the two sections cited. In the matter of proof on the joint and separate estates of partners, the provisions of those Acts resemble each other in a most striking manner.

Under the 145 section of the Bankruptcy Act of 1861 it was provided with respect to firm creditors as follows:

"But such creditor shall not receive any dividend out of the separate estate of the bankrupt until all the separate creditors shall have received the full amount of their respective debts." \*

The Insolvent Act of 1869 thus provides:

"64. If the Insolvent owes debts both individually and as a member of a co-partnership, or as a member of two different co-partnerships, the claims against him shall rank first upon the estate by which the debts they represent were contracted, and shall only rank upon the other after all the creditors of that other have been paid in full."

It must be admitted that the clause in the English Act is much more comprehensible than § 64, just given, for it is difficult to see how a separate creditor can rank on a joint estate after its creditors have been paid off, ere the accounts of the partners have been settled, when, as a matter of course, each partner's share of the balance falls into his separate estate.

By § 98 of the Insolvent Act of 1869, it is provided that:

"The consent in writing of the said proportion of creditors to

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\* B. L. C. Act, 1849, § 140.



“ the discharge of a debtor absolutely frees and discharges him,  
“ after an assignment, or after his estate has been put in compul-  
“ sory liquidation, from all liabilities whatsoever (except such as  
“ are hereinafter specially excepted) existing against him and prove-  
“ able against his estate, which are mentioned or set forth in the  
“ statement of his affairs exhibited at the first meeting of his credi-  
“ tors, or which are shewn by any supplementary list of creditors  
“ furnished by the Insolvent, previous to such discharge, and in  
“ time to permit of the creditors therein mentioned obtaining the  
“ same dividend as other creditors upon his estate, or which appear  
“ by any claim subsequently furnished to the Assignee, whether  
“ such debts be exigible or not at the time of his insolvency, and  
“ whether the liability for them be direct or indirect; and if the  
“ holder of any negotiable paper is unknown to the Insolvent, the  
“ insertion of the particulars of such paper in such statement of  
“ affairs or supplementary list, with the declaration that the hol-  
“ der thereof is unknown to him, shall bring the debt represented  
“ by such paper, and the holder thereof, within the operation of  
“ this section.”

The liabilities excepted are enumerated in

“ § 100. A discharge under this Act shall not apply, without  
“ the express consent of the creditor, to any debt for enforcing  
“ the payment of which the imprisonment of the debtor is per-  
“ mitted by this Act, nor to any debt due as damages for assault  
“ or wilful injury to the person, seduction, libel, slander, or mali-  
“ cious arrest, nor for the maintenance of a parent, wife or child,  
“ or as a penalty for any offence of which the Insolvent has been  
“ convicted, unless the creditor thereof shall file or claim there-  
“ for; nor shall any such discharge apply without such consent,  
“ to any debt due as a balance of account due by the Insolvent as  
“ an assignee, tutor, curator, trustee, executor or administrator  
“ under a will, or under any order of court, or as a public officer;  
“ nor shall debts to which a discharge under this Act does not  
“ apply, nor any privileged debts, nor the creditors thereof, be  
“ computed in ascertaining whether a sufficient proportion of the  
“ creditors of the Insolvent have voted upon, done, or consented  
“ to any act, matter or thing, under this Act; but the creditor  
“ of any debt due as a balance of account by the Insolvent as  
“ assignee, tutor, curator, trustee, executor, administrator or  
“ public officer may claim and accept a dividend thereon from

"the estate without being, by reason thereof in any respect affected by any discharge obtained by the Insolvent."

It may be laid down as a principle governing deeds of Composition and Discharge, that all the creditors signing the same must be placed upon a footing of equality the one with the other, and that the creditors who have not, should be entitled to reap from it the same advantages as those who have signed the deed.\*

No difficulty, as a general rule, will be experienced where the Insolvent has not been in partnership with other persons; for the only exception to the general rule recognized was in a case where a creditor acting as surety for the debtor to the other creditors, was held entitled to receive some advantage over the others, in respect of his acting in that position;† but such a bargain must be apparent on the face of the deed.‡

But when three or four persons trading in partnership either make an assignment or are put into insolvency, a difficulty presents itself in the event of any, or all, of the members wishing to effect an arrangement with his or their creditors, as the case may be.

In the Province of Quebec a partnership is dissolved by its insolvency, § consequently once in insolvency and an assignee appointed, there can be no doubt but that the partnership is at an end.

It is the object of this paper to bring before the public the leading cases on the subject of deeds of composition between members of partnerships and their joint and separate creditors, and to establish the proper course to follow in the framing of the deed so far as regards the joint and separate creditors, and the composition rate agreed upon.

Upon the construction to be placed on certain words occurring in § 94 depends, to a very great extent, the meaning to be attached to the other sections of the title of Composition and Discharge

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\* Sills on Composition Deeds, p. 42; *Walter v. Adcock*, 7 H. & N. 559, 561; *In re Rawlings*, 9 Jur. (N. S.) 316, 317; *Ilderton v. Castrique* 9 Jur. (N. S.) 993, 994; *Berridge v. Abbott*, 13 C. B. (N. S.) 507; *Clapham v. Atkinson*, 4 B. & S. 722, 726, 731; *Dingwall v. Edwards*, 4 B. & S. 738, 747, 754, 758; *Ex pte. Cockburn*, 10 Jur. (N. S.) 573; *Ilderton v. Jewell & al.* 10 Jur. (N. S.) 748.

† *Wells v. Hacon*, 33 L. J. Q. B. 204.

‡ *Wood v. Barker*, 1 L. R. Eq. 139.

§ Code Civil, art. 1892.

in the Insolvent Act of 1869. The words "the creditors" therein occurring are, in fact, the key-words of the whole title; they certainly are not limited in their signification; they comprise all persons who can be considered creditors of the Insolvent. The only question then to be decided is whether the creditor of a firm is also a creditor of the members of that firm. Under our law members of firms are jointly and severally liable for the debts of such firms to the firm creditors. It is perfectly true that the creditors of the individual members are entitled to be paid out of the proceeds of such member's private estate before the creditors of the firm to which such members belong can be paid thereout, but the liability of the members to their firm and the individual creditors is the same, the only difference is that one set is privileged on the private estate, the other is privileged on the joint estate. It cannot be urged that because the whole property (consisting entirely of moveables) of a person is pledged to a third party, that such debtor, though largely indebted to others, has no other creditor than the pledgee, and has no other liabilities than those existing in such pledgee's favour. Such a proposition would not be entertained for a moment, and therefore it may be laid down as incontestable that the creditors of a firm are also creditors of the members of such firm, and that the words "the creditors of the Insolvent" in § 94 of the Insolvent Act of 1869, mean the joint and separate creditors of such Insolvent.

The interpretation placed by the English Courts upon the words "his creditors" and "the creditors of such debtor" in § 192 of the Bankruptcy Act of 1861, is precisely similar to that which it is contended should be applied to the words "the creditors of the Insolvent" in § 94 of the Insolvent Act of 1869.

As already mentioned § 94 has evidently been borrowed from § 192 of the English Bankruptcy Act of 1861. The intention of the Parliament of Canada was to copy as closely as possible the provisions of the English law on the subject of Composition and Discharge. Moreover the common law of the Provinces of Ontario, New Brunswick, and Nova Scotia is based on the English common law. The court of last resort from judgments rendered throughout the Dominion is the Privy Council. The decisions of the English Courts are received throughout the sister Provinces as of binding authority. Consequently it may not be out of place here to cite at length some of the dicta of English

judges in rendering judgments, on matters affecting deeds of Composition and Discharge, under the Bankruptcy Act 1861.

In the case of *Walter v. Adcock*, 7 H. & N. 559, Bramwell, B, thus expressed himself: "The 192 section" (of the Bankruptcy Act of 1861) "says, 'every deed or instrument made or entered 'into between a debtor and his creditors,' that means all his 'creditors, but the section proceeds, 'or any of them.' That 'cannot mean any of them to the exclusion of the rest, because 'it would follow that a debtor might enter into an arrangement 'with some of his creditors by which the others would be bound 'though they received no benefit. That would be senseless. 'In my opinion 'any of them' means as trustees for the rest, 'that is, not on behalf of them, but on behalf of the whole. 'The section proceeds, 'relating to the debts or liabilities of the 'debtor,' that is, to all his debts, 'his release therefrom, or the 'distribution, inspection, management and winding up of his 'estate, or any of such matters, shall be as valid and effectual and 'binding on all the creditors of such debtor as if they were parties 'to and had duly executed the same.' That applies only to deeds 'which comprehend all the creditors and might be consistently 'executed by all. In fact it means a deed for the benefit of all 'his creditors. . . . It seems to me clear that a composition deed under the Bankruptcy Act, 1861, to be binding 'upon creditors who have not executed it, must appear *on the face of it* to be a deed of which any creditor may have the 'benefit, and may execute without repugnancy."

*In re Rawlings*, Court of Appeal in Chancery, Sir G. J. Turner, Lord Justice, thus expressed himself on the subject of deeds of Composition and Discharge, then presented to him for adjudication (9 Jur. N. S. 317): "I agree in the opinion expressed by 'one of the learned barons of the Court of Exchequer, that in 'order to bring a case within the section" (192nd of B. A. 1861) 'that the composition must be with all the creditors. . . . 'I think that the words 'debts' and 'liabilities' as used in the 'section thus read must be taken to relate to all the debts and 'liabilities; for not only is this, as I conceive, the ordinary 'meaning of the words. but it is scarcely possible to suppose that 'the Legislature could intend that all the creditors should be 'bound by an arrangement which was partial and confined in 'its operation to some of them only. In all these cases, therefore, I think the question to be considered must be, does the 'deed or instrument extend to all the creditors?"

Erle C. J. in the case of *Ilderton v. Castrique*, 9 Jur. N. S. p. 994, in giving judgment as to the validity of a deed of Composition and Discharge, after referring to the opinions of Sir G. J. Turner, L.J., and Bramwell, B. hereinbefore given, with approval, said, "The judges, therefore, seem to be agreed as to that point, and "as this deed has not complied with the provisions of the section," (192, B. A. of 1861) "by not being for the benefit of all the "creditors, it is consequently invalid." Willes, Byles and Keating, JJ., concurred.

In the case of *Clapham v. Atkinson*, 4 B. & S. p. 726, where a like question as to the validity of a deed of Composition and Discharge came up for consideration, Blackburn, J., in delivering the judgment of the Court of Queen's Bench, composed of Wightman & Mellor, J.J., and himself, said: "It is, independent of authority, clearly necessary that the creditors who are "to be bound by the acts of those executing the deed should be "at least in as good a position as those who bind them. . . . "And on the whole we think that the reasons which are so fully "stated by Lord Justice Turner in *Ex parte Rawlings*, that we "need not repeat them, are convincing."

This judgment was confirmed in the Exchequer Chamber, 4 B. & S. 730.

In *Dingwall v. Edwards*, 4 B. & S. p. 747, on a question affecting the validity of a deed, Blackburn, J., said: "In the recent case of "*Ilderton v. Jewell*, 16 C. B. N. S. p. 142," (cited hereafter) "in "the Exchequer Chamber, it was decided that the deed must, *on "the face of it*, show that it was intended to apply to all, and that "a deed not doing so was not helped by the facts extraneous to it "showing that it was in fact so intended. . . . It is also, "I think, settled by the decisions that in order to be within the "Act, the deed must be such as relate *to all the debts and liabilities* of the debtor, and to all his creditors, and that a deed which "excludes from its provisions any of the debts due to any of the "creditors, or, what I think comes to the same thing, does not "either expressly or by necessary inference include all of them, is "not binding on those who do not execute it . . . even "if the point were not concluded by the decision of the Court of "Exchequer Chamber, I should, as now advised, hold that the "deed must be such as, when properly construed, to show within "the four corners of the instrument itself that it is such a deed "as is within the provisions of the Act. . . . It has

“been determined, and I think most properly, that though the Bankruptcy Act of 1861 does not in terms say so, yet by necessary implication it is meant, that the provisions of the deed must be such as to give the non-assenting creditors, who are bound by it without their consent, the same advantages as are given to those who execute or assent to the deed. The injustice of permitting any part of the creditors to bar the rest, and at the same time to obtain for themselves any benefit beyond what is given to those whom they bar, is obvious; and even if there were no decisions upon this point, I think it could not be disputed that the Legislature never intended to give them such a power.”

Cockburn, C. J., in the same case at p. 753 says: “There is no difficulty in the law. It is not disputed that, in order that creditors not executing a composition deed shall be bound under the 192nd section of the Bankruptcy Act, 1861, they must be entitled to the same benefit under it, as is secured by it to the creditors executing it.”

Lord Westbury, at that time Lord Chancellor in *Ex pte. Cockburn re Smith & Laxton*, 10 Jur. N. S. p. 574, whilst rendering judgment as to the validity of a deed of Composition and Discharge, said, “But to render a deed of composition and release binding on the minority of the creditors, who have not executed, or assented to, or approved of it in writing, *it is necessary* that the non-assenting creditors should stand under the deed, in the same situation, and with the same advantages, as the creditors forming the majority. The 192nd section enacts that the creditors who have not assented are to be bound, ‘as if they were parties to, and had duly executed, the deed.’ It follows, that the provisions of the deed must be such as will apply to *all the creditors* equally, and without distinction or difference;” and at page 575: “It” (meaning the power to bind the minority) “of course rests on the assumption that terms which so large a portion of creditors, both in number and value, are willing to accept from an Insolvent, must be advantageous to the whole body of creditors; and this assumption necessarily implies that the terms agreed to are the same for all, and that *those who bind and those who are bound are in a situation of equality*. Where this is not the case, it seems to me that non-assenting creditors are not bound, according to the true intent and meaning of the statute;” and at p. 576: “As I explained on a former occasion, in my view of the statute, a deed to bind creditors who have not

"executed it, must be a deed which places the parties who execute  
"and the parties who have not executed upon an equal footing in  
"point of law."

In *Ilderton v. Jewell*, 10 Jur. N. S. p. 748, Martin, B., in delivering the judgment of the Court of Exchequer Chamber said :  
"I am of opinion, and five of my brethren agree, that the judgment of the Court of Common Pleas, ought to be affirmed.  
"We have all the same views of the Act of Parliament. The  
"192nd section enacts that 'Every deed entered into between a  
"debtor and his creditors, (that must mean *all* his creditors,)  
"or any of them or a trustee on their behalf' (which must be  
"taken to mean on behalf of *all*) 'relating to the debts and liabilities of the debtors (that is *all* the debts and liabilities)  
"shall be valid and effectual and binding on all the creditors,  
"provided certain conditions are observed."

In *Walker v. Nevill*, 3 H. & C. p. 414, Martin, B., remarked :  
"The statute enables a debtor to compound with his creditors,  
"but makes no distinction with respect to joint and separate  
"creditors." And Pollock, C. B., there said : "In all the cases  
"in which composition deeds have been held valid where partners  
"were the debtors, there must have been joint and separate creditors and joint and separate estates."

In the same case the present Lord Justice Mellish, then but Mr. Mellish, for the defendant, said (at page 416 of the report),  
"Where a debtor assigns all his property for distribution amongst  
"all his creditors, the estate must be administered as in bankruptcy. But under a composition deed it is not necessary that  
"there should be any assets of the debtor to be distributed. A  
"third person may covenant to pay the composition, and the creditors may thereby obtain a larger dividend than they could realize  
"from the bankrupt's estate. Where there are partners there  
"must always be joint and separate debts."

In *ex parte Glen in re Glen*, 2 L. R. Ch. Ap. p. 670, a person who carried on business in partnership, executed a composition deed for the benefit of his separate creditors only, which was assented to by the requisite majority of separate creditors. The firm was also indebted; and it was held that the deed was not binding on a dissenting separate creditor, for that a deed providing for one class of creditors only is not within § 192 of the Bankruptcy Act, 1861. Lord Cairns, at that time one of the Lords Justices, afterwards Lord Chancellor, (p. 672 of the re-

port) made use of the following expressions: "The debtor was a partner; he had joint creditors and separate creditors. Now § 192 *primâ facie* makes no difference between these classes; it speaks generally of a deed entered into between the debtor and his creditors, or any of them. The words 'or any of them' have been observed upon, but their meaning is obvious. The section contemplates as parties to the deed either all the creditors, or some of them as trustees for, or as representing the whole body of creditors. But to render the deed binding there must be an assenting majority in number, representing three-fourths in value of the creditors whose debts amount to £10 and upwards; that is, all the creditors need not be parties to the deed, but there must be the requisite majority approving of it; and according to the natural construction of the section, it must be a deed of which the benefit will enure to all the creditors generally."

Lord Justice Rolt in the same case at p. 673, said, "I am unable to understand how there can be, under the Act, a deed having the effect of binding some of the dissentient creditors without binding them all. There is no authority for holding section 192 and the following sections to give a deed such an effect; and the consequences of such a construction, which does not give to the words 'creditors' its natural meaning would be very serious."

In the case of *Tomlin & al., v. Dutton & al.*, 3 L. R. Q. B. p. 466, it was held that a deed of composition made between the members of a partnership and the joint creditors of the firm, none of the separate creditors being parties thereto, nor any provision being made for the separate creditors of the partners reaping equal benefits with the partnership creditors, was not within § 192 of the Bankruptcy Act, 1861, and was invalid against non-assenting joint creditors. Blackburn, J., there said (p. 468 of the report): "The plea sets up a deed made between the defendants and the creditors of the partnership only; if that be a deed within § 192 of the Bankruptcy Act, 1861, then the Act has given a new power, and it rests upon those that rely on this authority given by statute, and not known to the common law, to show by what words it is conferred. § 192 makes, under certain conditions, a deed entered into between a debtor and his creditors or any of them, or a trustee on their behalf, as binding on all the creditors of such debtor, as if they were parties to and had executed the deed. Now the literal sense of these



words must be, that the deed is to be between and for the benefit of all the creditors, inasmuch as it is to bind all the creditors of such debtor."

In *Rixon v. Emary*, 3 L. R. C. P., p. 550, Montague Smith, J., said in giving judgment: "We entirely agree in the decision of the Lords Justices in the case of *Re Glen*" (*supra*) that where "there are distinct classes of joint and several creditors, the deed must include and bind both sets of creditors;" and Bovill, C. J., in the same case said (p. 551): "I consider the law to be now settled, that a deed of arrangement by several debtors with their creditors must, in order to be binding upon non-assenting creditors under the 192nd section of the Bankruptcy Act, 1861, purport to be made or entered into with and to bind all their creditors, and must embrace several as well as joint creditors where any of each class exist."

In *Buvelot v. Mills*, 1 L. R. Q. B., p. 104, Cockburn, C. J., in delivering judgment said: "In order to make a deed under § 192 binding and effective upon the creditors who are not parties to it otherwise than so far as the statute compulsorily makes them parties, the deed must provide for such creditors in the same manner that it provides for those who are assenting parties."

In *Thompson v. Knight*, 2 L. R. Ex. p. 44, Kelly, C. B., said in delivering judgment: "There are, no doubt, a great number of these deeds executed daily, and daily forming the subject of discussion, and it is therefore necessary to state clearly the principle on which they are to be held valid or invalid. Now I think it absolutely essential that all the creditors should be placed on an equal footing, especially when I remember that, generally, a great number of them are in these cases bound by an instrument, to which they are not parties and to which they have not assented."

In *ex pte. Nicholson in re Nicholson*, 5 L. R. Ch. Ap. 335, Lord Justice Giffard in rendering judgment in a case wherein a deed of composition had been attacked, said "I agree that all deeds of this kind must deal equally with all . . . thus to put an extreme case, if a deed were simply to provide that one class of creditors should receive a larger composition than another, that could not bind dissenting creditors, for it would be on the face of the deed unfair."

In all the cases cited, two principles are recognised as governing deeds of Composition and Discharge. 1. That if the debtor

has joint and separate creditors, the majority required to bind the minority must be of the whole mass of his creditors joint and separate. 2. That under the deed perfect equality must reign, so far as the composition is concerned, between all the assenting and dissenting creditors, that is that each creditor should thereby be bound to submit to the same proportionate loss in the pound on his claim.

The French authorities, on the subject of equality between the creditors of a bankrupt who has effected a concordat with his creditors, are in accord with the dicta of the English judges. Renouard says: "Et cependant point de concordat s'il ne contient pas les mêmes conditions à l'égard de tous." \*

Gadrat expresses himself more fully on the subject: "Réciproquement, tous les créanciers jouissent des avantages stipulés au concordat en faveur de la masse, et, à ce titre ils peuvent exercer, contre les tiers qui ont garanti l'exécution du concordat, les mêmes droits que les créanciers vérifiés et affirmés. La situation de tous les créanciers est identiquement la même; aucun d'eux ne peut recevoir un dividende avant que les autres créanciers le reçoivent; chacun d'eux n'a droit qu'à sa part proportionnelle dans chaque distribution, et si par événement l'un d'eux avait reçu au delà de sa part proportionnelle, il serait tenu de faire à la masse le rapport de cet excédant." †

No difficulty can be experienced, as a general rule, in the drawing up of a deed of Composition and Discharge between a trader who has never been in partnership and his creditors. It is only when a partnership has been put into insolvency, or has assigned, that difficulties arise if there be joint and separate estates, or joint without separate estates, or separate without joint estates.

The cause of the difficulty in such case is the presumed clashing of the general principle of equality with that of distribution of the estates under § 64, and the respective ranking of joint and separate creditors.

The provisions of the English Bankruptcy Act of 1861, and those of the Insolvent Act of 1869, with respect to the ranking by partnership creditors on the separate estates of partners, are almost identical (*ante* p. 172). The general principles, out of insolvency or bankruptcy in England and Quebec, would appear

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\* Faillites & Banqueroutes, p. 9.

† Faillites & Banqueroutes, p. 291.

to be, that the assets of a partner are liable in the first instance for his separate debts, and those of the joint estate for the joint debts. Certain modifications of those principles exist under certain circumstances, but for the purposes of this paper it is unnecessary specially to consider them.

From what has already been shewn it is clear that the creditors of a person who has been in partnership are not only his separate creditors, but also the creditors of the partnership—the mere fact of there being no separate assets does not prevent the partnership creditors from being creditors of the partner having no separate property—the liability still exists, although there may be no separate and no joint estate, to the partnership creditors—if the contrary be held, it can only be on the absurd principle of “no assets, consequently no liabilities, consequently no creditors.”

But it is said in matters of composition effected by partners with their creditors, that, although no doubt the majority signing the deed of composition must be of the mass of their joint and separate creditors, the general rule of equality laid down as governing such deeds may be departed from, and different rates of composition may thereby be made payable to their joint and separate creditors, the same rate to each class, based upon the respective values of the joint and separate estates of the Insolvents.

A case presenting these features was recently decided in Montreal by Mackay J. holding the Superior Court.

B. H. & E. L. trading in partnership, in the month of March, 1870, made an assignment under the Insolvent Act of 1869; an assignee to their joint and separate estates was in due course appointed, and soon after a Deed of Composition and Discharge was drawn up and signed to the following effect:—For and in consideration of a composition of 7s. in the £ to be paid by B. H. the joint creditors discharged B. H. & E. L. from their partnership liabilities, and ordered the assignee to deliver over the partnership assets to B. H. For a composition of 10s. in the £ the separate creditors discharged B. H. from his separate liabilities, and ordered his private estate to be delivered over to him; and for a composition of  $\frac{1}{2}$  cent on the \$, the separate creditors of E. L. discharged him from his separate liabilities. The creditors in each class were declared to be, and actually were, the majorities in number, holding three-fourth of the liabilities in such class.

The applications for the confirmation of the discharges contained in the said deed of Composition and Discharge were resisted by J. J. & al., creditors of the partnership, on the ground of inequality of the composition : to this the Insolvents answered that the rate payable to each class was fair and just, being proportioned to the value of the assets belonging to each estate.

The facts proved maintained the allegations of the Insolvent's answers, but the learned Judge by his judgment rendered on the 30th January, 1871, maintained the contestations, and refused to confirm the discharges. In rendering judgment, he said :

MACKAY, J.—I have before me three petitions for confirmation of composition deed—one by B. Hutchins and E. Lusher as the late firm of B. Hutchins & Co.; the second by B. Hutchins as an individual: and the third by E. Lusher as an individual.

The petitions are all alike. The one by B. Hutchins and E. Lusher jointly, states assignment by them as the firm of B. Hutchins & Co. to John Whyte, an official assignee, on the 3rd March, 1870, and that on the 22nd of April the petitioners made a deed of composition with their creditors, according to law, and obtained a discharge from them; that the petitioners have done all required by them under the insolvency act; wherefore they pray for a sentence of confirmation of the said composition deed and of the discharge granted by it.

The petitions are opposed by Jeffrey & Co., creditors for over \$1,900. The reasons of opposition are that the composition deed is irregular, and does not provide for the creditors of the bankrupts getting equal amounts per £ or \$ of composition money; that from the deed of composition it appears that the creditors, joint, and individual or separate, have not agreed for an equal composition for the creditors, as ought to have been. Other reasons of opposition are that the bankrupts appear to have been contracting debts recklessly, and knowing of their being unable to pay; that they have been guilty of wasteful, extravagant living, &c.

The discharges referred to are contained in a deed of composition of 22nd April, 1870. (*His Honor read the Deed of Composition.*)

This deed provides for three compositions.

1st. One of 7s in the £ to the creditors of the firm of B. H. & Co.

2nd. One of 10s in the £ to the creditors of B. H. as an individual.

These compositions are to be paid by B. H.

The 3rd one is of half a cent per dollar which E. L. has paid to certain of his individual creditors.

Four creditors are named, three sign and get paid. No special provision for the 4th, nor for any others as creditors.

I notice that these three who have gotten this half cent, are appointed to get the 7s. composition amount also, and B. H.'s 10s. per pound too.

There is in the deed, after the composition, a general reconveyance clause; all the estates, firm and individual, being appointed to be given up to B. H. on the composition being paid.

As to the facts connected with this insolvency it may be stated briefly that B. H. & Co. in Feb., 1870, suspended with a deficit of over \$50,000.

In March, 1870, the assignment was made, one deed of assignment by the firm and individuals.

I can imagine the assignment to have been made as it was to prevent such question or difficulty as was in McFarlane's case.

That case determined that, whenever a firm became bankrupt, the estates of the individuals of it fell for administration in bankruptcy at the same time by the same assignee.

Upon the assignment of March, three meetings were held for appointment of assignees in the cases now before us. One of the firm creditors, at which J. Whyte, the official assignee, was elected assignee to the firm estate; another of the creditors, of B. H. individually. Nobody was at this meeting but J. Whyte, proxy for four persons absent. As proxy for one he moved, seconded by himself as proxy for another, that he himself should be appointed assignee, and it was carried, says his record.

The third meeting was of the creditors of Ed. Lusher individually; not even a proxy attended at this meeting, so J. Whyte as having been *interim* assignee, became the assignee to this estate.

These three meetings might have led to extra trouble had different persons been appointed assignees to the different estates.

The composition agreements on 22nd April, though in one and the same deed, proceed evidently upon the idea that three compositions had to be paid.

The separate creditors generally of B. Hutchins and of Ed. Lusher seem not to have been called to be parties to the 7s. composition of the firm.

It has been agreed that the one copy of composition agreement filed, and all the evidence in the cause, are to be held common to the three petitions and to Jeffrey's contestations.

At the argument Jeffrey relied chiefly upon his objections to the form of the composition deed; his counsel argued that it was unequal, providing different compositions for different creditors, that the firm creditors and the separate creditors of B. Hutchins individually, and of Ed. Lusher, ought to have fixed one and the same composition rate for the creditors; that the majority of "the creditors," that is, of all the creditors, several and joint, have not agreed upon any one composition; that the creditors, appearing before the notary, have thrown themselves into different sets, and settled different compositions for different creditors. Less stress was laid on the charges of extravagant living made against the bankrupts; it was urged, however, that they were, as regards Jeffrey, to be held in fraud, as they must have known that they were bankrupts when they bought the teas from Jeffrey, in respect of which his claim exists.

As to the charge of extravagant living, there is some proof; but considering that none of the creditors, excepting Jeffrey, appear here to complain of it, and that the inspectors (having considered the subject) excuse it, I am not disposed to be rigorous. Passing to the other charge of having bought Jeffrey's teas, knowing that they had not the means to pay for them, it is to be observed that the bankrupts are shown not to have moved towards that purchase of teas. They were pressed to take them. They pledged them almost immediately afterwards: but such pledgings are common in Montreal; and I cannot bring myself to adjudge upon the proofs before me, that the bankrupts knew themselves to be insolvent when they bought from Jeffrey, yet they were bankrupt a full year before they declared insolvency.

These teas were bought in January, 1870; the notes for them were not matured at the date of the insolvency. Immediately after the insolvency \$56,000 were stuck off by the creditors as bad, in estimating the assets of the bankrupt firm, still the firm had good credit almost up to the announcement of its insolvency, and seems to have had no idea that it was on the verge of such a calamity.

The composition deed as made, binds Jeffrey, it is said.

Has the deed all the requisites? Is it in form of law! Am I bound to confirm it?

Jeffrey contends that we have not before us a deed between the bankrupt and the creditors.

He refers firstly to § 192 of the English Act of 1861: "Every deed entered into between a debtor and his creditor," &c., and relies upon the English Courts' decisions on this Act, particularly as to the meaning of the word "creditors" in ours and in the English Act; among the cases cited is *Tomlin vs. Dutton*.\*

"A deed of composition between members of a partnership and their joint creditors without reference to the separate creditors of the different members of the firm is NOT within the 192 sec. of Bankruptcy Act of 1861—and is invalid even as regards a non-assenting creditor of the partnership."

Upon the English decisions, Sills on Composition Deed remarks p. 20: "The effect of these decisions is to render it doubtful whether any valid deed can be made by a member of a partnership if he has separate creditors; at any rate if the deed operates as a release of debts."

*Walker vs. Nevill*, vol xi. *English Jurist*, has also been referred as supporting this proposition: that a majority in value and amount of each class taken by itself need not be, for the 162 section of the English Act of 1861, or for a case like the one before us.

It is opposed to Jeffrey that the bankrupts' composition as arranged is perfectly fair; because if distribution under the Bankrupt Act had been worked out to the end, (or were it to be worked out) he Jeffrey *could not* get more than 7s. in the £, if as much. But this involves assumptions; besides, composition is not distribution in bankruptcy but a different thing, and the measure of the estate in bankruptcy or belonging to the bankrupts is for nothing in considering the legality of a composition deed.

It has also been urged that the reconveyance clause helps the composition agreement.

It is said that the creditors can sell all the estate at a dollar rate; but I see that between selling the estate and discharging the bankrupts there is a distance. The sale of an estate does not destroy creditors' hold on their debtors; but under formal composition the debtors go free—

Here is the reconveyance clause. (*His Honor here read the clause.*)

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\* A. D. 1868, law reports vol. iii. p. 467.

I consider it a *non sequitur* that, because of such a reconveyance, a composition deed reading as the one before us is a discharge of the Bankrupt *quoad* a non-assenting creditor like Jeffrey.

Nor can I yield to another argument, viz., that because in bankruptcy distinct accounts are to be kept, of the firm estates, and of the partners' separate estates, and because of distribution having to be as per sec. 94, several compositions may be, as in the deed before us.

Taking up the separate composition of B. H. we see it assented to by certain separate creditors, but the firm creditors are not named parties to it, nor counted for it, yet the separate estate is removed from Jeffrey, and from non-assenting creditors like him, and B. H. is declared discharged. This separate estate might yield a surplus applicable to Jeffrey, or to payment of his claim; though of course Jeffery is nominally a firm creditor only.

The separate composition agreement of Ed. Lusher is peculiar, and in considering it we are not to regard the fact alleged of his not having had assets. He might have been a person having assets of \$5,000 or \$10,000.

The conclusion that I have come to after considering everything is this: I do not see such a composition deed here as fulfils the law's requirement, nor discharge to the bankrupts that Jeffrey is bound by. Jeffrey has right, rather than be forced to submit to this composition deed (under which creditors who take 17s. and  $\frac{1}{2}$  a cent in the pound to themselves, appoint him to have only 7s.), to ask distribution by the working out of the bankruptcy act. He has right to dividends from the firm assets, and to the realization of B. H's. private estate, so as to find whether or not he get something out of that. This is not demonstrated to be impossible. This composition deed is irregular, providing dividends or composition amounts for the creditors unequally and contrary to law. So the three petitions are rejected, the contestations of them being to a certain extent, as explained by what has been said, maintained with costs.

*Judgment.*—The composition deed is pronounced irregular, unequal, and illegal, and of no force against contestant, and allegations of petitioners not being proved, confirmation of the discharge is refused, and the petitions are severally rejected, with costs to contestant, Jeffery.

(*To be continued.*)

WILLIAM H. KERR.



## LE DROIT CONSTITUTIONNEL DU CANADA.

La Province de Québec, à part peut-être l'Etat de la Louisiane, est sans contredit le pays où les sources de lois sont les plus diverses et mixtes. En matières civiles, les lois de l'ancienne France, telles qu'en force en Canada lors de la cession à la Couronne Anglaise, forment en général le droit commun de cette colonie originairement Française. Néanmoins, son droit public et criminel lui vient presque *in toto* de la Grande Bretagne. Depuis près d'un siècle, sa Législature a encore largement emprunté des lois de la mère-patrie, particulièrement en matières commerciales; et en 1866, son Code Civil lui apportait subitement un grand nombre d'articles de droit nouveau du Code Napoléon. Enfin son Code de Procédure Civile est le fruit d'un mélange encore indigeste de droit Français et de droit Anglais. Que faut-il donc ajouter pour démontrer que la science du droit en Bas-Canada est plus compliquée et plus difficile que dans n'importe quelle contrée du monde. Evidemment, le juge et l'avocat ne peuvent y arriver, sans posséder le droit Romain et le droit moderne et ancien des grandes nations de notre époque, sans être familiers aussi bien avec Pothier que Blackstone, Troplong que Story, aussi bien avec les statuts de la colonie et la jurisprudence de ses tribunaux et des tribunaux Français qu'avec les ordonnances de la monarchie Française et les *Law Reports* de ces mille et un précédents dont les Anglais et les Américains nous dotent si libéralement chaque année. Il y a dans ce vaste champ, qui oserait le nier! assez de matériaux pour l'esprit légal le mieux développé, assez d'éléments pour satisfaire pendant des siècles l'ambition des membres les plus érudits du Banc et du Barreau. La sphère du droit en Bas-Canada ne s'arrête pourtant pas là. Les rapports commerciaux que la vapeur et le fil électrique ont si considérablement contribué à multiplier entre nos nationaux et leurs compatriotes des autres provinces, ou les citoyens de l'Union Américaine, sont encore venus jeter sur le terrain judiciaire les matières toujours si épineuses du droit international privé. Voilà enfin que tout à coup un nouveau régime politique vient y ajouter les *Questions Constitutionnelles*; et de fait à peine trois années s'étaient-elles écoulées sous son

empire, que nos tribunaux étaient appelés à décider une de ces questions aussi délicates qu'importantes dans l'affaire de *Bélisle v. L'Union St. Jacques de Montréal*.\*

La décision de cette cause nous a engagé à offrir au public quelques notes sur le droit constitutionnel du Canada, qui, à cause de la nouveauté du sujet, pourront peut-être avoir quelque intérêt et quelque utilité pratique.

#### I.—SOURCES DU DROIT CONSTITUTIONNEL DU CANADA.

Chaque Etat a sa constitution; mais chaque Etat n'a pas un droit civil constitutionnel proprement dit. Dans les pays qui, comme la Grande Bretagne, la France et tant d'autres, sont soumis à une seule autorité souveraine, les conflits constitutionnels ne sont guère possibles; tandis que dans d'autres, où plusieurs souverainetés se côtoient dans de certaines limites, ils deviennent une nécessité du régime politique, que l'on appelle le *régime fédéral*. De ce nombre sont les confédérations de l'Amérique du Sud, les Etats Unis d'Amérique et le Canada. Il est évident que quand deux ou plusieurs Etats se trouvent unis sous deux ou plusieurs pouvoirs souverains, ayant chacun une juridiction spéciale et limitée, la validité ou constitutionnalité de leurs actes respectifs (car les législatures ne sont pas plus infaillibles que les autres hommes) doit nécessairement être mise en question; et pour décider le différend, il faudra avoir recours à une autorité ~~suprême~~, commune à tous. Cette autorité, c'est la Constitution. "If a number of political societies" dit Story,† et son autorité mérite ici tout le respect dont elle jouit dans sa patrie, puisque notre Constitution, à part la souveraineté extérieure, est presque identique à celle de nos voisins, "enter into a larger political society, the laws which the latter may enact, pursuant to the powers entrusted to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent upon the good faith of the parties, and not a government, which is only another name for political power and supremacy. But it will not follow, that acts of the larger society, which are not pursuant to its constitutional powers, but are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. They will be merely acts of usurpation, and will deserve to be

\* Suprà, p. 118.

† Commentaries on the Constitution of U. S. § 965.

treated as such. Hence we perceive, that the clause\* only declares a truth, which flows immediately and necessarily from the institution of a national government. It will be observed that the supremacy of the laws is attached to those only, which are made in pursuance of the constitution; a caution very proper in itself, but, in fact, the limitation would have arisen by irresistible implication, if it had not been expressed."

Dans l'examen des questions constitutionnelles, il faut donc consulter uniquement la Constitution du pays, connue sous le nom de "L'Acte de l'Amérique Britannique du Nord, 1867," et devenue en force le 1er juillet de la même année. Le législateur, après avoir déclaré dans le préambule de l'acte: "Considérant que les provinces du Canada, de la Nouvelle-Ecosse et du Nouveau-Brunswick ont exprimé le désir de contracter une Union Fédérale pour ne former qu'une seule et même Puissance (Dominion) sous la couronne du Royaume-Uni de la Grande Bretagne et d'Irlande, avec une constitution reposant sur les mêmes principes que celle du Royaume-Uni," accorde cette union (sect. 3), qu'il divise en quatre provinces, Ontario, Québec, Nouvelle-Ecosse et Nouveau-Brunswick, pour des fins d'une nature locale.

La Puissance possède un parlement composé de la Reine, représentée par le Gouverneur-Général, d'une chambre haute, appelée le Sénat, et de la Chambre des Communes.

Chacune des quatre provinces a sa législature propre composée du Lieutenant-Gouverneur, nommé par le Gouverneur-Général en conseil, du Conseil Législatif et de l'Assemblée Législative. La Province d'Ontario possède une législature composée d'une seule chambre, l'Assemblée Législative.

La section 91 définit l'autorité législative du Parlement du Canada et ordonne que "l'autorité législative exclusive du Parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets ci-dessous énumérés," savoir entr'autres:

"La réglementation (regulation) du trafic et du commerce;" (p. 2).

"La navigation et les bâtiments ou navires (shipping); p. 10.

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\* Art. 6, sec. 2, de la Constitution des Etats Unis: "This constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

" Les lettres de change et les billets promissoires ; p. 18.

" La banqueroute et la faillite ; (Bankruptcy and Insolvency,) p. 21.

" Le mariage et le divorce ; p. 26.

" La loi criminelle, sauf la constitution des tribunaux de juridiction criminelle, mais y compris la procédure en matière criminelle."

La section ajoute : " Et aucune des matières énoncées dans les catégories de sujets énumérés dans cette section (91) ne sera réputée tomber dans la catégorie des matières d'une nature locale ou privée."

La section 92 déclare que la législature de chaque province " pourra exclusivement faire des lois relatives aux matières tombant dans les catégories de sujets ci-dessous énumérés," savoir, entr'autres :

" Les institutions municipales dans la province" ; p. 8.

" L'incorporation de compagnies pour des objets provinciaux ; p. 11.

" La célébration du mariage dans la province ; p. 12.

" La propriété et les droits civils dans la province ; p. 13.

" L'administration de la justice pour la province, y compris la création, le maintien et l'organisation de tribunaux de justice pour la province, ayant juridiction civile et criminelle, y compris la procédure en matières civiles dans ces tribunaux" ; p. 14.

Enfin la section 129 déclare que les lois et pouvoirs en force dans chacune des colonies lors de la mise en force de l'Acte Fédéral, continueront d'exister ; " mais ils pourront néanmoins (sauf les cas prévus par des actes du parlement de la Grande Bretagne ou du Royaume-Uni de la Grande Bretagne et d'Irlande) être révoqués, abolis ou modifiés par le parlement du Canada, ou par la législature de la province respective, conformément à l'autorité du parlement ou de cette législature en vertu du présent acte."

Ces dernières expressions sont formelles et précises. Les législatures pourront faire des lois, *pourvu qu'elles ne violent ni la Constitution, ni les statuts de l'Empire.*

Mais les traités de l'Empire avec les nations étrangères doivent ils être considérés comme faisant partie de la Constitution et par conséquent supérieurs aux lois des législatures coloniales ? Il n'y a aucun doute que les stipulations des traités qui ont été confirmées par des actes du Parlement Britannique ont force de loi et prennent les statuts du Canada. Tel est l'article 4 du Traité de Paris

de 1763, qui accorde la liberté de la religion catholique aux habitants du Canada, confirmé par l'Acte de Québec de 1774, 14 Geo. 3, ch. 83, sec. 5; et telles sont aussi les stipulations du Traité d'Ashburton pour l'extradition des fugitifs criminels, qui autrefois et encore récemment a reçu la sanction de la législature de l'Empire.

Mais que faut-il décider quand une loi des législatures coloniales viole les dispositions d'un traité qui n'est pas revêtu de l'autorité des statuts Impériaux? Il n'est guère probable que la civilisation moderne soit témoin d'une violation aussi hardie des traités de la nation. Pourtant un tel spectacle n'est pas impossible. L'on peut supposer que le Parlement du Canada prohibe aux citoyens Américains de faire la pêche dans les eaux où ce privilège leur est assuré par le Traité de 1818, et qu'en vertu de cette loi prohibitive un navire Américain soit capturé. Il va sans dire que le Gouvernement de la Grande Bretagne serait alors responsable du dommage. Mais nos tribunaux ont-ils juridiction pour entendre la plainte du propriétaire et ordonner main-levée de la prise comme ayant été faite en contravention du traité et du droit des gens?

La solution de la question présente des difficultés sérieuses, d'autant plus graves qu'elles ont à peine été touchées par les publicistes sur le droit international. Dans cet état incertain et encore imparfait de la science, il serait téméraire de hasarder une opinion. Aussi dans les quelques remarques qui suivent, nous avons plutôt l'intention de poser le problème que de le résoudre.

Chitty \* a dit, et son langage paraît être accepté par plus d'un jurisconsulte comme l'expression d'un axiôme populaire du droit public anglais: "I should conceive that in no case whatever can a judge oppose his own opinion and authority to the clear will and declaration of the legislature. His province is to interpret and obey the mandate of the supreme power of the State."

Dwarris a admirablement traité cette matière dans son ouvrage *on Statutes*, p. 480-485; et nous croyons faire plaisir au lecteur en reproduisant tout ce qu'il en dit:

"An act of Parliament shall not change the laws of nature, for  
 "† *jura naturæ sunt immutabilia*, and they are *leges legum*:  
 "Nec vero per *Senatum aut per populum*, solvi hæc lege pos-  
 "sumus, says Cicero.‡ The law of nature stands as an eternal

\* Sur Blackstone, vol. 1, p. 27.

† Hobart 87.

‡ Fragment.

"rule to all men, says Locke, legislators as well as others; \* and  
 "the rules that they make for other men's actions must, as well as  
 "their own and other men's actions, be conformable to the will of  
 "God, of which *that* is a declaration.

"If a statute say, that a man shall be a judge in his own cause,  
 "such a law being contrary to natural equity, shall be void. Such  
 "was the (at least, intrepid) opinion of Lord Chief Justice Hobart  
 "in *Day and Savage*. Influenced by the same powerful sense of  
 "justice, Lord Coke, when Chief Justice, in Bonham's case,† un-  
 "guardedly, perhaps, but fearlessly, declared, that where an Act of  
 "Parliament is against common right or reason, or repugnant, or  
 "impossible to be performed, the common law shall control it, and  
 "adjudge it to be void. And Lord Holt, in the case of *The City*  
 "*of London and Wood*,‡ to the dismay of all mere lawyers, man-  
 "fully expressed an opinion, that the observation of Lord Coke was  
 "not extravagant, but was a very reasonable and true saying.

"There is reason to believe that what Lord Coke said in his  
 "reports upon this subject is part of what King James alluded to  
 "when he said that 'in Coke's Reports were many dangerous  
 "'conceits of his own, uttered for law, to the prejudice of the  
 "'Crown, Parliament and subjects.' Lord Ellesmere, in his  
 "observations on Lord Coke's Reports, calls this passage 'a para-  
 "'dox which derogateth much from the wisdom and power of  
 "'Parliament; that when the three estates, King, Lords and  
 "'Commons, have spent their labour in making a law, three  
 "'judges on the bench shall destroy and frustrate their pains;  
 "'advancing the reason of a particular Court above the judgment  
 "'of all the realm. Besides, more temperately,' he says, 'did  
 "'that reverend Chief Justice Herle, *temp. Ed. 3*, deliver his  
 "'opinion, 8 *Ed. 3*, cited in *Co. Rep.* 11 f, 98, when he said:  
 "'Some acts of Parliament are made against law and right;  
 "'which they *that made them* perceiving, would not put them  
 "'into execution; for it is *magis congruum* that acts of Parlia-  
 "'ment should be corrected by the same pen that drew them,  
 "'than be dashed to pieces by the opinion of a few judges.'  
 "Again, the pugnacious Lord Chancellor, talking at the Lord  
 "Chief Justice, speaks of a 'prudent judge as one who did not

\* Lib. 2, c. 11, s. 35; and see Hooker's Ecclesiastical Polity, 1,  
 and Bishop Cumberland *De Lege Naturæ*.

† 8 Rep. 116.

‡ 12 Mod. 687.

“ ‘judge statutes void if he considered them to be against common right and reason, but left the Parliament to judge what was common right and reason.’ So, Sir W. Blackstone\* confines the rule of avoidance of unreasonable statutes, to any absurd consequences which arise out of them collaterally. The judges, he says, are in decency to conclude that *this* consequence was not foreseen by the Parliament, and only *quoad hoc*, to disregard it. ‘If the Parliament will positively enact anything to be done which is unreasonable, he knows,’ he justly says, ‘of no power in the ordinary forms of the constitution, that is vested with authority to control it.’

“ Reasoning *pro*.—But the advocate of natural as opposed to positive or instituted law, may inquire what is intended by *contrary to reason*? Is not Lord Coke to be taken to mean, not merely capricious and without cause; absurd and even mischievous; but contrary to the law of nature, which we discover by the use of reason; to that light, distinct from revelation, by which we discover the boundaries of right and wrong? and then, our admirable commentator has himself, in another place declared: ‘No human laws are of any validity, if contrary to the laws of nature.’

“ An instance is found in the books, in which on the general doctrine that statutes contrary to common right and reason, &c. ‘are void,’—and the position from Hobart being cited† the judges observed that they would not hold a statute to be void, unless it were clearly contrary to natural equity; adding with more of force perhaps than of dignity, that they would *strain hard* rather than hold a statute to be void. Does it not follow as an irresistible inference, that if the statute be clearly contrary to natural equity—if it impugn that original law which is coeval with our nature, and has God for its author, the judges (according, at least, to the feelings of those presiding on that occasion), *must* with whatever reluctance—however averse to defeating a statute—their duty requires them—to disregard it?

“ But, it has been observed, to do this, would be to set the judicial power above the legislative. Upon which two observations may be made: first, this argument seems to prove too much; for it applies as strongly to setting aside the collateral as the direct consequences of an act; and if the one take place,

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\* 1 Com. 91.

† 10 Mod. 115.

" (barring the objection to the indecency of supposing it necessary), why not the other. Secondly, Lord Coke does not leave the decision to be governed 'by the crooked cord of the discretion of the judges;' but it is to be 'measured by the golden metwand of the law;' he says, it shall be controlled *by the common law*. To pronounce such a decision, is, on the part of the judges, nothing more than to say, Vast as is the power of an Act of Parliament, there are some things which it cannot do. It can do no wrong; it cannot abrogate those living laws imprinted in our hearts from the commencement of our being. In the conceivable and barely possible case, of a statute directing the commission of an offence against the law of nature, can there be a doubt that, in such instance, no human laws would be in any degree binding? or, what amounts to the same thing, that there exists a precedent and paramount obligation to disobey them? A statute cannot make it lawful for A to commit adultery with the wife of B, for the law of God, forbids it. Neither, it has been asserted, are positive laws, even in matters seemingly indifferent\* any further binding than as they are agreeable to the laws of God and nature.

" Reasoning *con*.—On the other hand, it is said, that though the *principle* asserted above is undeniably true, yet the application of it and the conclusion, are most dangerous.† It is certain that no human authority can rightfully infringe or abrogate the smallest particle of natural or divine law;‡ but we must distinguish, it is observed, between right and power, between moral fitness and political authority. It must not be ascertained as a question of ethics; but of the bounds and limits of legislative power.

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\* Fonbl. chap. 1, s. 3.

† 1 Woodison's Lect.—do. Elements of Jurisprudence, 36 and 48. Bl. Com. vol. 1, *ante*.

‡ Among the seven maxims or virtues essential to the written law of Spain, one is, 'that its precepts ought to be respecting things good, reasonable, just, and not opposed to the law of God,' to attain its only object, justice, which is rooted virtue *raigada virtud*—Ll. 1 and 4 Tit. 1, Partid 1, L. 1, Tit. 1, p. 3. So, the unwritten law, (*uso costumbre y fuero*) receiving its authority from the express or tacit consent of the supreme power, that consent cannot be supposed or presumed when the custom is opposed to the law of God, to good reason, to the law of the kingdom, and to natural law. L. 5, Tit. 2, Partid. 1. L. 3, Tit. 1. Lib. 2. Recop.



"Absolute power must reside somewhere; and to it, implicit obedience must be paid. It can nowhere be so safely placed, as in the hands of those who frame the laws according to settled forms and after mature deliberation; though the laws they establish may, sometimes be pernicious, opposed to morality, and, as we can collect it to the Divine will. As measured by the law of God, which must be the ultimate test, human laws may be unjust, but they will still be obligatory.

"All that can be done, it seems, is, to follow the philosophical advice of Locke, who says that if the magistrate shall enjoin any thing unlawful to the conscience of a private person, such private person is to abstain from the action he judges unlawful, and he is to undergo the punishment; which is not unlawful for him to bear. The same acquiescence in the laws is enjoined in the admirable dialogue of Plato, entitled *Crito*.

"The English lawyers adopt a more cautious and a very characteristic mode of proceeding. They do not inculcate implicit obedience to a law which leads to absurd consequences, or to an infraction of the natural or Divine law, neither do they proclaim the law itself, (which may be immoral, but cannot be illegal), of no validity, and null and void. They only hold it inapplicable, and declare that the particular case is 'excepted out of the statute.' A practical mode of dealing with cases where statutes collaterally give rise to absurd consequences, on the ground of such consequences being unforeseen, which cannot be denied to be reasonable.

"The general and received doctrine certainly is, that an Act of Parliament of which the terms are explicit and the meaning plain, cannot be questioned, or its authority controlled, in any court of justice. Yet Sir Edward Coke, manfully, if not convincingly, defended his opinion before the Council, and said: "If an Act of Parliament were to give to the lord of a manor consusance of all pleas arising within his manor, yet he shall hold no plea whereunto himself is a party: for *iniquum est aliquem suae rei esse judicem*.' Now, Sir E. Coke had in his Second Institute, put the same case, enlarged upon and illustrated it; and successfully contended that the case must be correctly interpreted to be exempted out of the provisions of the statute; that a contrary construction could not be within the meaning of the act. The law, therefore, was to be properly construed not to apply to such cases; but the law itself was not

"to be held void. See post, 'Cases excepted out of statutes'  
 " *'Fit autem non tollendo legis obligationem, sed declarando  
 " legem in certo casu non applicare.\*"*

Bien qu'il y ait quelques différences dans les termes de ces opinions, elles aboutissent presque toutes à cette conclusion que les actes du Parlement, évidemment contraires à la loi divine ou naturelle, doivent être ignorés par les tribunaux; suivent les unes parceque l'acte de la Législature est nul,† et suivant les autres parcequ'il y a alors lieu d'appliquer la maxime: *Fit autem non tollendo legis obligationem, sed declarando legem in certo casu non applicare.*

Revenant aux traités, est-il nécessaire d'ajouter qu'ils reposent sur le droit naturel, sur ce droit qui permet aux nations comme aux individus de s'engager? La raison et le bon sens ne nous disent-ils pas qu'il n'est jamais permis de violer la foi promise, cette foi que les peuples même barbares ont toujours considérée comme sacrée?

Quoi qu'il en soit, c'est un principe incontestable que le pouvoir qui a fait des lois peut seul les abolir. Or les traités sont des lois pour les nations contractantes et leurs sujets. Ils ne peuvent donc être valablement révoqués ou modifiés que par les parties qui les ont établis. Ils ont donc une autorité supérieure à l'action particulière de l'une de ces parties.

Nous disons que les traités sont des lois pour les parties contractantes, parcequ' ils ont pour elles toute la force du droit international et que le droit international fait partie des lois d'un Etat.

"Les nations," dit Eschbach,‡ sont indépendantes l'une de l'autre, et il est vrai qu'il n'y a au dessus d'elles ni un tribunal suprême pour juger leurs différends, ni une maréchaussée pour contraindre à l'exécution des jugements. Partant pour ceux qui nient l'existence du droit là où ils ne rencontrent pas un pouvoir constitué capable d'en assurer l'observation par la force, le Droit international n'est qu'une chimère, un mot vide de sens. Mais pour quiconque sait distinguer le Droit d'avec la garantie du Droit, le Droit international existe, bien qu'il n'y ait pas de tribunaux internationaux.§

\* Grotius.

† C'est aussi l'avis de Brown, *Legal Maxims* (p. 14, ed. 1864.)

‡ Etude du Droit, p. 54.

§ Voir aussi Dans sur Wheaton, § 17.

Ainsi, quoique le droit international soit un droit imparfait *vis-à-vis des nations*, en ce sens qu'il n'est pas *exécutoire* entr'elles, il existe et doit par conséquent recevoir son exécution chaque fois que cette exécution est possible; et elle l'est presque toujours entre particuliers.

Le monde ne possédant aucun tribunal international, il suit naturellement qu'aucune nation ne peut faire exécuter le droit international; et lorsque la foi promise est violée, il ne lui reste pas d'autres recours accessibles que ceux de la diplomatie ou la guerre. Mais la situation n'est pas la même entre les individus lorsqu'il s'agit de donner suite à leurs demandes privées. Ici, il existe un tribunal et le droit international public se trouve entouré de toute la garantie du droit international privé et des autres lois de l'État; alors en un mot l'exécution du droit international est non seulement possible; elle est même un devoir pour toute cour de justice de l'État.

Aussi Lord Talbot disait dans une cause de *Buvot v. Barbut*: "That the law of nations, in its full extent, was part of the law of England. That the act of Parliament was declaratory, and occasioned by a particular incident. That the law of nations was to be collected from the practice of different nations and the authority of writers."\*

Lord Mansfield observait à propos de cette décision: "I was counsel in this case, and have a full note of it. I remember, too, Lord Hardwicke's declaring his opinion to the same effect, and denying that Lord Chief Justice Holt ever had any doubt as to the law of nations being part of the law of England. Mr. Blackstone's † principles are right."

N'est-ce pas ce droit des nations que nos cours de justice maintenaient à Montréal dans le célèbre procès des maraudeurs de St. Albans? Le droit international fait donc partie des lois du pays.

C'est un principe trop élémentaire, pour pouvoir être mis en doute, que les traités, une fois dument ratifiés, font partie du

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\* 3 Burrow's Rep. 1481.

† 3 Burrow's R. 1481.—L'immortel commentateur, avocat dans la cause, soutenait que le droit international faisait partie des lois de l'Empire; et dans l'espèce Lord Mansfield déclara que le statut impérial, qui frappait les négociants de certaines pénalités et incapacités, ne s'appliquait pas au serviteur d'un ambassadeur, bien qu'il fût sujet anglais et qu'il eût fait commerce dans le Royaume Uni avant d'être attaché à l'ambassade.

droit international. "Où est donc," se demande Eschbach, "la source des règles et des principes du droit international? . . . Elle est dans le droit naturel, dans les coutumes et *conventions internationales* et dans les théories des publicistes. . . . Il y a donc un droit international conventionnel; c'est celui qui repose sur les *traités*, et un droit international coutumier; c'est celui qui est fondé sur les usages."\*

Le droit international conventionnel, il est vrai, n'a pas un empire aussi vaste que le droit international coutumier. Le premier est pour ainsi dire limité; il ne lie que les pouvoirs contractants; mais il fait toujours partie du droit international, car il fixe les relations de nation à nation. Pour mieux dire, les traités sont par rapport au droit international ce que sont les conventions des particuliers par rapport au droit civil, avec cette notable distinction que les traités dument ratifiés ne peuvent être répudiés sous prétexte d'être contraires à la morale et à l'ordre public. Le droit international coutumier au contraire est universel et il oblige toutes les nations de la terre.

Enfin, chaque habitant d'un pays est censé être présent aux actes des autorités gouvernementales. Cela est si vrai, surtout en matière de traités, que les sujets sont personnellement responsables devant les tribunaux de l'État des dommages qu'ils causent en les violant, même lorsqu'ils agissent de bonne foi et dans l'ignorance de l'existence du traité.† Les traités ont donc pour le sujet la force des lois de l'État; et c'est aussi ce qu'enseignent plusieurs publicistes d'une haute autorité.

*Halleck* ‡: "The treaty is a law to the subjects of the contracting parties."

*Félice* §: "Si des traités faits dans ces circonstances sont obligatoires entre les États ou les souverains qui les ont faits; ils le sont aussi par rapport aux sujets de chaque prince en particulier; ils sont obligatoires *comme conventions* entre les puissances contractantes; mais ils ont *force de lois* à l'égard des sujets considérés comme tels."

\* Etude du Droit, p. 58.

† 10 East. 536; Wheaton, Int. Law, pt. 4, ch. 4; Wildman, Int. Law, vol. 1, p. 160; Kent, Com. on Am. Law; Phillimore, Int. Law, vol. 3, § 646, p. 447 (ed. 1857); Heffter, Dr. Int. § 183; Halleck, Int. Law, p. 858; The Mentor, per Sir W. Scott, 1 Robinson, 183.

‡ Int. Law, p. 856.

§ Droit de la Nature, vol. 2, p. 458.

*Heffter* \* : " Les traités publics réels qui concernent les sujets " et les rapports individuels, ont la même autorité que les lois de " l'État, s'ils ont été contractés et publiés régulièrement."

*Dupin* † : " Les traités sont obligatoires comme conventions " entre les puissances contractantes ; mais ils ont force de lois à " l'égard des sujets considérés comme tels."

Enfin, la Conférence de Londres ne vient-elle pas d'affirmer le même principe de la manière la plus solennelle, en déclarant à l'unanimité : " That it is an essential part of the *law of nations* " that *no power* can shake off the engagements of a treaty or " modify its stipulations except with the assent of the contracting " parties." ‡

La Constitution Américaine n'a pas voulu laisser cette matière importante dans le doute de la science. L'article 6, par. 2, déclare : " This constitution and the laws of the United States " which shall be made in pursuance thereof, and *all treaties* made " or which shall be made, under the authority of the United " States, shall be the *supreme law of the land*." Il est remarquable que les commentateurs comme les tribunaux ne citent presque jamais cet article pour appliquer le principe qu'il consacre ; ils considèrent sans doute qu'il existe par suite de l'ordre naturel des choses, de droit commun public pour ainsi dire.

*Abdysur Kent* § : " All treaties made by that power become of " absolute efficacy, because they are the supreme law of the land."

*Story* || : " In regard to treaties, there is equal reason why they " should be held, when made, to be the supreme law of the land. It " is to be considered, that treaties constitute solemn compacts of " binding obligation among nations ; and unless they are scrupulously obeyed and enforced, no foreign nation would consent to " negotiate with us ; or if it did, any want of strict fidelity on our " part of the discharge of the treaty stipulations would be visited " by reprisals or war. It is, therefore, indispensable that they " should have the obligation and force of a law, that they may " be executed by the judicial power, and be obeyed like other " laws. This will not prevent them from being cancelled or " abrogated by the nation upon grave and suitable occasions ; for

\* Droit International, p. 186.

† Principes du Droit de la Nature et des Gens, vol. 5, p. 198.

‡ Séance de 17 Janvier, 1871.

§ International Law, p. 410.

|| Com. on Const. of U. S., § 966 ; voir aussi Wheaton, éd. Dana § 266.

"it will not be disputed, that they are subjected to the legislative power, and may be repealed, like other laws at its pleasure, or they may be varied by new treaties; still, while they do subsist, they ought to have a positive binding efficacy, as laws, upon all the states and all the citizens of the states. The peace of the nation, and its good faith, and moral dignity, indispensably require that all state laws be subjected to their supremacy. The difference between considering them as laws, and considering them as executory, or executed contracts, is exceedingly important in the actual administration of public justice. If they are supreme laws, courts of justice will enforce them directly in all cases, to which they can be judicially applied, in opposition to all state laws, as we all know was done in the case of the British debts secured by the treaty of 1783, after the Constitution was adopted. If they are deemed but solemn compacts, promissory in their nature and obligation, courts of justice may be embarrassed in enforcing them, and may be compelled to leave the redress to be administered through other departments of the government. It is notorious that treaty stipulations (especially those of the treaty of peace of 1783) were grossly disregarded by the states under the Confederation. They were deemed by the states, not as laws, but like requisitions, of mere moral obligation, and depended upon the good will of the states for their execution. Congress, indeed, remonstrated against this construction, as unfounded in principle and justice."

La jurisprudence Américaine ne laisse aucun doute sur le point que les traités font partie de la loi suprême de l'Union, et qu'ils sont supérieurs aux lois particulières des Etats; mais elle ne va pas jusqu'à indiquer la règle à suivre en cas de conflit entre le Congrès et les traités. Il semblerait que, vu qu'aux Etats-Unis les traités n'obtiennent force de loi que par la sanction du Congrès, le dernier acte de ce corps doit prévaloir sur le premier. D'un autre côté l'action du Congrès dans un tel cas n'est pas seulement législative, elle est surtout internationale; et ne peut-on pas soutenir que tant que les nations étrangères n'ont pas renoncé à la convention, les tribunaux Américains doivent respecter le traité nonobstant l'ordre contraire du Congrès? Quoi qu'il en soit, il n'en est pas ainsi des traités de la Grande Bretagne; ils peuvent généralement être consentis sans le concours des Chambres; et même à propos des traités qui doivent être ratifiés par le Parlement, ne peut-on pas dire que, dès lors qu'il

est admis que la législation coloniale doit se courber devant les conventions internationales de l'Empire, parcequ'elles forment partie des lois Impériales tant qu'elles n'ont pas été éteintes ou modifiées par les pouvoirs contractants, il faut également admettre que le Parlement Britannique lui-même n'est pas plus puissant à cet égard que le Parlement du Canada, et que tous deux sont soumis à l'autorité des traités.

Qu'il nous soit permis, en terminant, d'observer qu'il est temps que la règle (si elle existe), que les lois de l'Etat priment ses contrats, disparaisse de son code national. Elle a son origine dans un état social qui n'existe plus : celui où chaque nation, pour cause d'éloignement et de plusieurs autres circonstances, regardait avec jalousie et méfiance l'action de ses voisins. Les relations commerciales du monde moderne ont effacé les distances et les préjugés nationaux ; elles ont fait de l'univers, pour ainsi dire le séjour d'une seule et même société ; et évidemment elles rendent les traités aussi nécessaires que les lois particulières de l'Etat. Il est donc hautement à désirer que la justice fasse place à l'égoïsme des temps passés, et que les conventions internationales soient vues et appliquées avec ce respect qui entoure les lois spéciales de chaque peuple. L'intérêt public comme l'honneur national et le bonheur de l'humanité en général exigent que tel soit le dernier mot du droit international.

Enfin l'argument que, si les tribunaux peuvent maintenir les traités même à l'encontre des lois de l'Empire, le pouvoir judiciaire serait tout puissant et même au dessus de l'Empire, n'a plus sa raison d'être. Il n'y a pas plus de danger, ni d'anomalie, à investir la magistrature du droit de faire respecter les traités que de maintenir la constitution. Dans ce dernier cas comme dans le premier, le tribunal est juge souverain et en dernier ressort. Les deux matières nous semblent reposer sur un même piédestal, la parole nationale, l'une donnée par le Souverain, l'autre par le Parlement, avec cette remarquable différence que les traités appartiennent à un ordre de choses plus élevé que celui d'aucune législation particulière, et que partant ils commandent plus d'autorité et d'obéissance. Le salut public demanda impérieusement qu'il en soit ainsi, et le salut du peuple est la loi suprême. *Salus populi suprema lex.*

Comme nous l'avons annoncé, nous n'avons pas la prétention de trancher cette question délicate, mais seulement de la soumettre à l'examen des esprits philosophes de la profession.

(A continuer.)

D. GIBOUARD.

### THE FREE NAVIGATION OF THE RIVER ST. LAWRENCE BY THE CITIZENS OF THE UNITED STATES.

The consolidation of the Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, into the Dominion of Canada, has opened a wide field for the exercise of statesmanship to the leaders of the Canadian people. Dependent but in name, Canadians are now free to shape the destinies of their country.

With increased powers have arisen new responsibilities. The Dominion must now bear a full share of the burthens of the realm in lieu of the trifling weights laid on the infant Provinces by the Mother Country. Conflicting rights require adjustment, national and religious prejudices claim treatment, and international difficulties demand settlement. To restore friendly commercial relations with our neighbours, but lately sources of prosperity; to subdue the jealousy of race, the bane of the Province of Canada; to extinguish the embers of religious feud, now threatening to burst into flame; to arrange the Fishery, the St. Lawrence, and the Fenian difficulties, all pregnant with war, if not settled at once and for ever,—are some of the tasks of the Ministry of the day. Verily, the bark of State requires skilful handling by its pilots to avoid the reefs and shoals lying in its course.

With a population of but four millions, Canada is bounded to the south by the United States, inhabited by nearly forty millions of people. The absorption of Mexico and the Dominion into the Union is favoured by many American statesmen; the Continent of North America, with the adjacent islands, forming one vast Republic, is the dream of United States politicians. The instability of parties, the corruption pervading the body politic, and the power of the mob, all combine to make the policy of the United States uncertain and dangerous to their neighbours. No expedient to divert the minds of their people from the strife of party, would be so popular as a foreign war, undertaken for the acquisition of territory on this continent; each individual would think that in the national losses he would secure a fortune, and would smother his patriotism in his selfishness.

For many years past the United States Government has nursed



grievances against their neighbours—it is of more importance that the Alabama claims should never be settled than that by a money payment far exceeding the actual losses, the grievance should be abated. The Fishery, the St. Lawrence, and the Fenian questions, are all open sores, irritating to Canada and Great Britain, which, when the opportunity is favourable, may furnish pretexts for a declaration of war.

It is the object of this paper to investigate the claim so persistently brought forward by the United States to the right of free navigation of the River St. Lawrence, to determine its validity, and to suggest, if possible, a mode in which it can be quieted for ever.

President Lincoln, in his Message to Congress, delivered on the 5th Nov. 1870, thus drew the attention of his countrymen to the subject :

THE NAVIGATION OF THE ST. LAWRENCE.

A like unfriendly disposition has been manifested on the part of Canada in the maintenance of a claim of right to exclude the citizens of the United States from the navigation of the St. Lawrence. This river constitutes a natural outlet to the ocean for eight States with an aggregate population of about 17,600,000 inhabitants, and with an aggregate tonnage of 661,367 tons upon the waters which discharge into it. The foreign commerce of our ports on these waters is open to British competition, and the major part of it is done in British bottoms. If the American steamer be excluded from this natural avenue to the ocean, the monopoly of the direct commerce of the Lake ports with the Atlantic would be in foreign hands, their vessels on transatlantic voyages having an access to our lake ports which would be denied to American vessels on similar voyages. To state such a proposition is to refute its justice. During the administration of Mr. John Quincy Adams, Mr. Clay unquestionably demonstrated the natural right of the citizens of the United States to the navigation of this river, claiming that the act of the Congress of Vienna in opening the Rhine and other rivers to all nations showed the judgment of European jurists and statesmen that the inhabitants of a country through which a navigable river passed have a natural right to enjoy the navigation thereof as far as the sea, even though passing through the territory of another power. This right does not exclude the co-equal right of the sovereign possessing the territory through which the river debouches into the sea to make such regulations relative to the policy of the navigation as may be reasonably necessary, but these regulations should be framed in a liberal spirit of comity, and should not impose needless burdens upon the commerce which has the right of transit. It has been found in practice more advan-

tageous to arrange these regulations by mutual agreement. The United States are ready to make any reasonable arrangement as to the police of the St. Lawrence which may be suggested by Great Britain. If the claim made by Mr. Clay was just when the population of the States bordering on the shores of the lakes was only 3,400,000, it now derives greater force and equity from the increased population, wealth, production, and tonnage of the States on the Canadian frontier. Mr. Clay advances his argument on behalf of our right, the principles for which he contended have been frequently and by various nations recognized by law, or by treaty has been extended to several other great rivers. By the treaty concluded at Mayence in 1831, the Rhine was declared free from the point where it is first navigable into the sea. By the convention between Spain and Portugal, concluded in 1835, the navigation of the Douro, throughout its whole extent, was made free for the subjects of both countries. In 1853, the Argentine Confederation, by treaty threw open the free navigation of the Paran and Uruguay rivers to the merchant vessels of all nations. In 1856, the Crimea war was closed by a treaty which provided for the free navigation of the Danube. In 1858, Bolivia, by treaty, declared that it regarded the Rivers Amazon and La Plata, in accordance with the fixed principles of national law, as highways or channels opened by nature for the commerce of all nations. In 1859 the Paraguay was made free by treaty, and in December, 1866, the Emperor of Brazil, by Imperial decree, declared the Amazon to be open to the frontier of Brazil to the merchant ships of all nations. The greatest living British authority on this subject, while asserting the abstract right of the British claim, says it seems difficult to deny that Great Britain may ground her refusal upon strict law; but it is equally difficult to deny, first, that so doing she exercises a law harsh in the extreme. Secondly, that her conduct with respect to the navigation of the St. Lawrence is in glaring and discreditable inconsistency with her conduct with respect to the navigation of the Mississippi on the ground that she possessed a small domain in which the Mississippi took its rise. She insisted on the right to navigate the entire volume of its waters, on the ground that she possessed both banks of the St. Lawrence, where it disembogues itself into the sea. She denies to the United States the right of navigation, though about one-half of the waters of Lakes Ontario, Erie, Huron, and Superior, and the whole of Lake Michigan, through which the river flows, are the property of the United States. The whole nation is interested in securing cheap transportation from the agricultural states of the west to the Atlantic seaboard to the citizens of those States. It secures a greater return for their labour to the inhabitants of the seaboard. It offers cheaper food to the nation, an increase in the annual surplus of wealth. It is hoped that the Government of Great Britain will see the justice of abandoning the narrow and inconsistent claim to which the Canadian Provinces have urged their adherence.

Wheaton in his "Elements of International Law," gives a statement of the controversy on the subject in the following words:

"The claim of the people of the United States of a right to navigate the St. Lawrence to and from the sea, was, in 1826, the subject of discussion between the American and British governments.

"On the part of the United States Government, this right is rested on the same grounds of natural right and obvious necessity which had formerly been urged in respect to the river Mississippi. The dispute between different European powers respecting the navigation of the Scheldt, in 1784, was also referred to in the correspondence on this subject; and the case of that river was distinguished from that of the St. Lawrence by its peculiar circumstances. Among others, it is known to have been alleged by the Dutch, that the whole course of the two branches of this river which passes within the dominions of Holland, was entirely artificial; that it owed its existence to the skill and labour of Dutchmen; that its banks had been erected and maintained by them at a great expense.

"Hence, probably, the motive for that stipulation in the treaty of Westphalia, that the lower Scheldt, with the canals of Sas and Swien, and other mouths of the sea adjoining them, should be kept closed on the side belonging to Holland. But the case of the St. Lawrence was totally different, and the principles on which its free navigation was maintained by the United States had recently received an unequivocal confirmation in the solemn act of the principal States of Europe.

"In the treaties concluded at the Congress of Vienna, it had been stipulated that the navigation of the Rhine, the Neckar, the Mayn, the Moselle, the Maese, and the Scheldt, should be free to all nations. These stipulations, to which Great Britain was a party, might be considered as an indication of the pre-sent judgment of Europe upon the general question.

"The importance of the present claim might be estimated by the fact that the inhabitants of at least eight States of the American Union, besides the territory of Michigan, had an immediate interest in it, besides the prospective interests of other parts connected with this river, and the inland seas through which it communicates with the ocean. The right of this great and growing population to the use of this its only natural outlet to the ocean, was supported by the same prin-

“ciples and authorities which had been urged by Mr. Jefferson  
“in the negotiation with Spain respecting the navigation of the  
“river Mississippi. The present claim was also fortified by the  
“consideration that this navigation was, before the war of the  
“American Revolution, the common property of all the British  
“subjects inhabiting this continent, having been acquired from  
“France by the united exertions of the Mother Country and the  
“Colonies in the war of 1756. The claim of the United States  
“to the free navigation of the St. Lawrence was of the same  
“nature with that of Great Britain to the navigation of the  
“Mississippi, as recognized by the 7th article of the Treaty of  
“Paris 1763, when the mouth and lower shores of that river  
“were held by another power. The claim, whilst necessary to  
“the United States, was not injurious to Great Britain, nor  
“could it violate any of her just rights.

“On the part of the British Government, the claim was con-  
“sidered as involving the question whether a perfect right to the  
“free navigation of the River St. Lawrence could be maintained  
“according to the principles and practice of the law of nations.

“The liberty of passage to be enjoyed by any one nation  
“through the dominions of another, was treated by the most  
“eminent writers on public law, as a qualified occasional excep-  
“tion to the paramount rights of property.

“They made no distinction between the right of passage by a  
“river, flowing from the possessions of one nation through those  
“of another, to the ocean, and the same right to be enjoyed by  
“means of any highway, whether of land or water, generally  
“accessible to the inhabitants of the earth. The right of passage  
“then, must hold good for other purposes besides those of trade,  
“—for objects of war as well as for objects of peace,—for all  
“nations, not less than for any nation in particular,—and be  
“attached to artificial as well as to natural highways. The prin-  
“ciple could not therefore be insisted on by the American govern-  
“ment unless it was prepared to apply the same principle by  
“reciprocity, in favour of British subjects, to the navigation of  
“the Mississippi and the Hudson, access to which from Canada  
“might be obtained by a few miles of land carriage, or by the  
“artificial communications created by the canals of New York  
“and Ohio. Hence the necessity which has been felt by the  
“writers on public law, of controlling the operation of a principle  
“so extensive and dangerous, by restricting the right of transit

“to purposes of *innocent* utility, to be exclusively determined by the local sovereign. Hence the right in question is termed by them an *imperfect* right.

“But there was nothing in these writers, or in the stipulations of the treaties of Vienna, respecting the navigation of the great rivers of Germany, to countenance the American doctrine of an absolute natural right. These stipulations were the result of mutual consent, founded on considerations of mutual interest, growing out of the relative situation of the different States concerned in this navigation. The same observation would apply to the various conventional regulations which had been, at different periods, applied to the navigation of the river Mississippi. As to any supposed right received from the simultaneous acquisition of the St. Lawrence by the British American people, it could not be allowed to have survived the treaty of 1783, by which the independence of the United States was acknowledged, and a partition of the British dominions in North America was made between the new government and that of another country.

“To this argument it was replied, on the part of the United States, that if the St. Lawrence were regarded as a *strait*, connecting navigable seas, as it ought properly to be, there would be less controversy. The principle on which the right to navigate straits depends, is, that they are accessorial to those seas which they unite, and the right of navigating which is not exclusive, but common to all nations; the right to navigate the seas drawing after it—that of passing the straits.

“The United States and Great Britain have between them the exclusive right of navigating the lakes. The St. Lawrence connects them with the ocean. The right to navigate both (the lakes and the ocean), includes that of passing from one to the other through the natural link.

“Was it then reasonable or just that one of the two co-proprietors of the lakes should altogether exclude his associate from the use of a common bounty of nature, necessary to the full enjoyment of them?

“The distinction between the right of passage claimed by one nation through the territories of another, on land, and that on navigable water, though not always clearly marked by the writers on public law, has a manifest existence in the nature of things.

“In the former case, the passage can hardly ever take place,

“ especially if it be of numerous bodies, without some detriment  
“ or inconvenience to the State whose territory is traversed. But  
“ in the case of a passage on water, no such injury is sustained..  
“ The American government did not mean to contend for any  
“ principle, the benefit of which, in analogous circumstances, it  
“ would deny to Great Britain.

“ If, therefore, in the further progress of discovery, a connection should be developed between the river Mississippi and  
“ Upper Canada, similar to that which exists between the United  
“ States and the St. Lawrence, the American government would  
“ be always ready to apply, in respect to the Mississippi, the  
“ same principles it contends for in respect to the St. Lawrence.

“ But the case of rivers which rise and debouch altogether  
“ within the limits of the same nation, ought not to be confounded  
“ with those which, having their sources and navigable portions  
“ of their streams in States above, finally discharge themselves  
“ within the limits of other States below.

“ In the former case, the question as to opening the navigation  
“ to other nations, depended upon the same considerations which  
“ might influence the regulation of other commercial intercourse  
“ with foreign States, and was to be exclusively determined by  
“ the local sovereign. But in respect to the latter, the free navigation of the river was a natural right in the upper inhabitants,  
“ of which they could not entirely be deprived by the arbitrary  
“ caprice of the lower State. Nor was the fact of subjecting the  
“ use of this right to treaty regulations, as was proposed at  
“ Vienna to be done in respect to the navigation of the European  
“ rivers, sufficient to prove that the origin of the right was conventional and not natural. It often happened to be highly  
“ convenient, if not sometimes indispensable, to avoid controversies by prescribing certain rules for the enjoyment of a natural  
“ right.

“ The law of nature, though sufficiently intelligible in its great  
“ outlines and general purposes, does not always reach every  
“ minute detail which is called for by the complicated wants and  
“ varieties of modern navigation and commerce. Hence the right  
“ of navigating the ocean itself, in many instances, principally  
“ incident to a state of war, is subjected, by innumerable treaties,  
“ to various regulations. These regulations—the transactions of  
“ Vienna, and other analogous stipulations—should be regarded  
“ only as the spontaneous homage of man to the paramount

"Lawgiver of the universe, by delivering, His great works from  
"the artificial shackles and selfish contrivances to which they  
"have been arbitrarily and unjustly subjected."

DESCRIPTION OF THE COURSE OF THE RIVER ST. LAWRENCE,  
AND OF THE ST. LAWRENCE AND WELLAND CANALS.

The St. Lawrence ceases to be the boundary between the United States and Canada at or near St. Regis, an Indian village situated about sixty miles above Montreal. To the west of that place the northern shores of the river, Lake Ontario and Lake Erie belong to Canada, the southern to the United States. From St. Regis eastward the territory on both sides of the river belongs to Canada. Between St. Regis and Montreal are the Cedars, Cascade and Lachine rapids, all navigable by vessels of small draft of water descending to the sea, but unnavigable by all vessels ascending. The Beauharnois and Lachine canals have been built on Canadian territory, enabling vessels going up the river to pass from Montreal to St. Regis. The Cornwall canal is also on Canadian territory, but the Longue Sault, which it enables vessels to pass, is above St. Regis, and consequently is owned on the south *ad flum aquæ* by the United States. Between lakes Erie and Ontario the river precipitates itself over the Falls of Niagara. On Canadian territory is the Welland canal, affording means of communication for schooners and propellers of moderate size, between those lakes.

AUTHORITIES ON THE QUESTION OF FREE NAVIGATION  
OF RIVERS.

By the Roman law rivers were public, that is to say, belonged to the particular people through whose territory they flowed, but could be used and enjoyed by all men: the use of their banks also was public.

"Riparum quoque usus publicus est juris gentium, sicut ipsius fluminis. Itaque navem ad eas adplicare, funes arboribus ibi natis religare, onus aliquod in his reponere cuilibet liberum est sicut per ipsum flumen navigare; sed proprietas earum illorum est quorum prædiis hærent; qua de causa arbores quoque in iisdem natæ eorundem sunt."\*

The doctrine in England, from a period anterior to the publication of Selden's "*Mare Clausum*," has been, not only that cer-

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\* Ins. lib. 2, tit. 1, § 4.

tain portions of the open sea can be reduced into the absolute possession of a nation, but that all straits and rivers running through its territory belong to the nation in absolute property. Writers upon international law term this right that of exclusive use, but at bottom the right claimed and exercised is not the less one of absolute property.\*

Of late years the question of the free navigation of rivers flowing through conterminous States has frequently been considered, and many treaties have been made regulating such navigation, to which several of the States of Europe and America have become parties :

Treaty of Paris, 30th May 1814.

“ “ 30th March, 1856.

“ “ 1763.

“ “ 1783.

Art. 109 de l'acte finale du Congrès de Vienne du 9 juin 1815, concernant la navigation fluviale.

Acte de navigation du Danube, signé le 7 Nov. 1857, art. 1.

Treaty between Austria and the Duchies of Parma and Modena of the 3rd July, 1849.

Treaties of 12th and 13th October, 1851, of Rio Janeiro.

Treaty of 10th July, 1853, between General Urguiza and the representatives of France, Great Britain, and the United States.

Decret du 10 Oct. 1853, de la bande Oriental.

Treaty between Brazil and Peru of 23rd Oct. 1851.†

The rights of States holding territories on rivers, as the United States and Canada do on the St. Lawrence, are treated in the following manner by the text writers :

“ En vertu de ce principe l'état pourra exercer une surveillance  
“ et une police pour regler la navigation du fleuve ; et pourra  
“ pourvoir, par des règlements opportuns, à concilier l'intérêt de  
“ sa sureté avec le droit des autres nations de se servir du fleuve  
“ comme d'un moyen de communication ; mais il ne pourra pas  
“ défendre positivement aux autres nations la navigation sur ce  
“ fleuve.”‡

“ Si le fleuve par court ou baigne plusieurs territoires, les

\* See 1 Twiss p. 109.

† See Carathéodary “ Du Droit International concernant les Grands Cours d'Eau,” pp. 112—151.

‡ 1 Fiore Nouveau Droit International, p. 357.



“États riverains se trouvent dans une communion naturelle à l’égard de la propriété et de l’usage des eaux, sauf la souveraineté de chaque État sur tout l’entendue du fleuve, depuis l’endroit où il atteint le territoire jusqu’au point où il le quitte. Aucun de ces États ne pourra donc porter atteinte aux droits des autres; chacun doit même contribuer à la conservation du cours d’eau dans les limites de sa souveraineté et le faire parvenir à son voisin. De l’autre part chacun d’eux, de même que le propriétaire unique d’un fleuve, pourrait ‘*stricto jure*’ affecter les eaux à ses propres usages et à ceux de ses regni coles, et en exclure les autres.”\*

Wheaton thus expresses himself of what is called “the right of innocent use:”

“Things of which the use is inexhaustible, such as the sea and running water, cannot be so appropriated as to exclude others from using those elements in any manner which does not occasion a loss or inconvenience to the proprietor. This is what is called an innocent use. Thus we have seen that the jurisdiction possessed by one nation over sounds, straits, and other arms of the sea, leading through its own territory to that of another, or to other seas common to all nations, does not exclude others from the right of innocent passage through these communications. The same principle is applicable to rivers flowing from one State through the territory of another into the sea, or into the territory of a third State. The right of navigating for commercial purposes a river which flows through the territory of different States, is common to all the nations inhabiting the different parts of the banks; but this right of innocent passage being what the text writers call an *imperfect* right, its exercise is necessarily modified by the safety and convenience of the State affected by it, and can only be effectually secured by mutual convention regulating the mode of its exercise.”†

#### APPLICATION OF AUTHORITIES TO QUESTION.

The publicists who favour the doctrine of free navigation of straits running through different States, found their opinions upon the principle, that such straits were made and intended by

\* Heffter § 77, p. 155. See Klüber, § 76; Bluntschli, § 319, 322; 1 Ortolan Dip. de la Mer, p. 146; 1 Kent, pp. 35, 36; Wolsey, § 58.

† Laurence's Wheaton, ed. 1863, p. 346, § 12.

nature to serve as channels of communication between navigable seas the common property of all nations. The basis of the American claim to the free navigation of the St. Lawrence is, that nature intended that river as the channel of communication between the Atlantic Ocean, the common property of all peoples, and the great lakes, the joint property of Great Britain and the United States.

The right then of free navigation of the St. Lawrence depends upon the fact of that river being a natural channel of communication between the Atlantic Ocean and the great lakes. If it be not such natural channel, the American claim to its free navigation must be pronounced unfounded.

In order that a strait may be a channel of communication between seas, it must be navigable. If by nature it be not navigable, it cannot be a channel of communication between seas. Therefore no right can exist to navigate an unnavigable strait.

The first point then to be established as the basis of the American claim to the navigation of the St. Lawrence from St. Regis to the ocean, is the navigability of that river in all its course through Canadian territory.

It has already been shewn that at three places between St. Regis and Montreal, the St. Lawrence is unnavigable by ascending vessels, though navigable by those of a light draught of water descending. It cannot therefore be considered navigable in the full sense of the term, owing to the impossibility of its being used as a channel of communication from the Ocean to St. Regis. The right of the Americans then being measured by the natural facilities of its course for navigation, it may safely be laid down that they have a right to its navigation down to the Ocean, but have no right to navigate it from the Ocean to St. Regis.

Granting, then, the right of navigation from St. Regis to the Atlantic Ocean to the Americans, it remains to be seen whether it can be exercised independently of the Government of Canada.

From the authorities already cited, it is apparent that vessels passing through a navigable strait are subject to the sovereignty of the State to which the strait belongs. The right of passage exists in favour of the foreign vessel, the rights of jurisdiction and sovereignty of such State are unimpaired in every other particular. A State has the right of taking such precautions as may be necessary for self-defence, and the preservation of its revenues and rights within its own territory. The right to search

neutral vessels on the high seas exists in favour of belligerents. The right to search all vessels coming into its maritime territory exists in favour of each State in the world, as well in peace as in war time. A State owning a strait has therefore at all times the right of search over passing vessels, and can take such precautions as may be necessary to insure that such passage be not productive of harm to itself. As a natural consequence of the principle, foreign vessels have but the right of innocent passage through such strait, and must submit to the regulations made by the State proprietor, to prevent their abusing the privilege accorded.

The pretension of the British Government in 1826 as to the right of passage through such strait being but an imperfect right, is incontestable.

The navigation downwards of the St. Lawrence would be of but little use to the inhabitants of the United States, if it were impossible for their vessels to make return voyages through the Gulf to the great lakes. The St. Lawrence presents insuperable obstacles to vessels, trying to ascend the channel between Montreal and St. Regis. The canals on Canadian territory alone enable vessels to take advantage of the navigable, and to avoid the unnavigable portions of the river, and thus make the upward passage to United States territory.

Without the right of navigating the canals, that of navigating the St. Lawrence would be almost worthless. As yet no direct claim of right to such canal navigation has been advanced by the United States; but in the claim so persistently pressed for many years is concealed in embryo that to the navigation of the canals, to be brought forth at the proper moment.

The foundation whereon reposes the American claim to the navigation of the St. Lawrence from St. Regis downwards is, that that river is the natural channel of communication for vessels from the great lakes to the Ocean, and that it is impossible to make use of such channel without navigating that portion of the river which flows through Canada. Thus the impossibility of passing over United States territory forms part of the corner-stone of the right of United States vessels to pass over Canadian territory, in making use of a bounty of nature.

But above St. Regis, Canadian and United States vessels have equal rights in the navigation of the river, each country owning one of the banks. There are no canals in United States territory, whilst on Canadian soil canals have been made by which vessels

can avoid the Longue Sault rapids and the unnavigable parts of the Niagara river, and thus pass with ease from St. Regis up the St. Lawrence to Lake Ontario, and thence through the Welland canal to Lake Erie.

The first objection to the claim to navigate the canals is, that the basis on which rests the American right to navigate the St. Lawrence, viz: that that river is a natural channel of communication between the great lakes and the sea, does not support a right to navigate artificial canals. It may be urged that they are accessional to the navigation of the river, that having been erected by the government with the intention of thereby overcoming the difficulties of navigation, they are dedicated to the public use of all entitled to exercise the right of navigating the St. Lawrence, that the Americans have the same rights of navigation of the St. Lawrence as British subjects and consequently they have the same rights in the Canadian canals. On the other hand it may be urged that the Canadian canals are built on Canadian soil, over which the Americans never possessed any rights, that being superstructures on land, they are owned by the proprietors of the land on which they are built, that having been erected by Canadian labour and capital, they follow the natural order of things and belong to those who built them, that the facts of their having been erected by the State and destined to public use do not give any right to foreign nations freely to navigate them, as in such case the use contemplated was merely that by British subjects, that canals do not necessarily, any more than railroads, by the law of nature, form portions of the public property of the State within which they are built, and that consequently when they are private property no foreign state can possess even a right of servitude upon them, and that to canals generally, the principle of the Roman law which submitted its banks to the use of vessels navigating the river, never has been and cannot now be extended.

If the claim to navigate the canals of Canada be admitted, on the same principle the Erie and the Whitehall canals should also be thrown open to Canadian vessels.

But the impossibility, which may be urged so far as the Cedars, Cascades and Lachine Rapids are concerned, of the United States making canals on their own territory by which those rapids may be avoided, cannot be pleaded in favour of the claim to the navigation of the Cornwall and Welland Canals.

The south banks of the St. Lawrence and the Niagara belonging to the United States, canals might be built thereon, affording to American citizens the same facilities now presented by the Cornwall and Welland Canals to British subjects. If then canals are not in existence on those banks, the United States cannot turn their want of enterprise to advantage by claiming a portion of the benefits secured to British subjects by the enterprise and expenditure of the Canadian government, and insist upon a right to navigate the Welland and Cornwall Canals.

A great deal of ridicule was wasted upon the President's desire, as it was said, to navigate the Falls of Niagara, but it is perfectly clear that the claim advanced was merely to the navigation of the St. Lawrence between St. Regis and the sea.

The President endeavors to fortify his position by referring to the treaties regulating the navigation of the Rhine, Danube, and other rivers in Europe and America. Such treaties he pretends shews the judgment of jurists and statesmen on the subject; so far as regards the *expediency* of throwing open the rivers in question to navigation he is correct in his pretensions, but with regard to the rights of other nations to navigate a river or part of a river, exclusively the property of one State, he is wrong. Principles of International Law are not created by treaties. That Law in its entirety was in existence ere men had banded into tribes; it has ever been and shall ever be immutable. Man sees but dimly in this world and has discovered but few of its principles, whereof still fewer are universally admitted, but as well deny that the laws of gravitation had existence before Newton as affirm that God, ere nations were known, had not framed a perfect code of laws for their government.

But the treaties referred to have really no bearing on the pretensions advanced: 1st. because none of them apply to a river similar in its nature to the St. Lawrence; 2nd. because they all apply to rivers, but from the points where they first become navigable to the sea.

#### CONCLUSION.

Having thus considered in its legal aspect the claim of the United States to the free navigation of the St. Lawrence, and the objections of the British and Canadian governments to its entertainment, it but remains to consider the manner in which the pretensions of the parties may be reconciled and the question set at rest.

It would seem to be clear that the United States admit that the right of navigation claimed is but an imperfect right, and that

the governments of Great Britain and Canada partake of that opinion. The President in his Message expresses the willingness of the people of the United States to agree to any fair terms for the enjoyment of the right of navigation. Putting aside the question of reciprocity, which, if granted, would remove not only this question but that of the Fisheries from discussion, it would seem that other terms might be agreed upon satisfactory to the Canadian and American peoples.

In order to render the St. Lawrence available as a channel of communication to and from the Great Lakes for the commerce of the West, the canals constructed by the Canadians must be very much enlarged, entailing an expense of many millions of dollars. It would be unfair in the highest degree that Canada should be compelled to pay the expense of such enlargement, as the people of the United States would benefit thereby in far greater proportion than Canadians. Moreover, the original cost of the canals as they now exist was defrayed by Canada. The whole work, when completed, will be for the interest of the great States bordering on the lakes and Canada, and the cost of the whole should be divided between the United States and Canada in proportion to the populations respectively of the lake-bordering States and the Dominion.

Such an arrangement would be extremely beneficial to Canada. The enlargement of the canals and the throwing open of the St. Lawrence to foreign trade would increase immensely the commerce of the Dominion. The St. Lawrence would become the highway over which would pass the harvests of the West, to Europe and the sea board States, and the manufactures of the East to the great West.

As it is, Canada is not benefited by the exclusion of American vessels from the navigation of the St. Lawrence. The refusal to allow such passage is, it must be admitted, unneighborly and very like that of the dog renowned in fable. If the United States are blind to the advantages of reciprocity, let Canada secure the benefits which must inevitably flow from the improvement and enlargement of the Dominion canals. If the United States are willing to contribute their fair share of the cost of construction there is no reason why Canada should not possess the finest and most important canals in the world. Thereby both countries would be benefited to an immense extent, and the troublesome St. Lawrence Question set at rest for ever.

WILLIAM H. KERR.

## THE JOINT HIGH COMMISSION.

The sitting of this Commission, intrusted with the delicate task of settling the great conflicts of international law, which have so deeply agitated public opinion, not only in the British Empire and in the neighbouring Republic but throughout the civilized world, is an event important, indeed, but not surprising, in the history of our century. In this essentially commercial age, the desire, nay, the determination of nations is, to avoid war, and to have recourse to peaceful means of adjusting their disputes. At the hour when a war, fierce beyond any which the human race has ever witnessed, was ravaging with wildest fury one of the mightiest empires of the earth, the nineteenth century alone could produce the Conference of London and the Joint High Commission at Washington.

This Commission possesses a more than ordinary interest for the people of Canada. At the very moment of writing these lines, the question of our Fisheries may have received a solution by their partial surrender. It is therefore of the highest importance to Canadians to know what will be the legal effect of such a decision.

If we are to believe the Imperial Blue Books, Her Majesty has given to her Commissioners, or to any three of them, full power to decide, jointly with an equal number of the American Commissioners, and "to sign for us and in our name everything so agreed upon and concluded, and to do and transact all such matters as may appertain to the finishing of the aforesaid work *in as ample manner and form and with equal force and efficacy* "AS WE OURSELVES COULD DO IF PERSONALLY PRESENT: *engaging and promising upon our Royal word, that whatever things shall be transacted and concluded by Our said High Commissioners, Procurators and Plenipotentiaries, shall be agreed to, acknowledged and accepted by us in the fullest manner, and that we will never suffer, either in whole or in part, any person whatever to infringe the same, or act contrary thereto, AS FAR AS IT LIES IN OUR POWER.*"

A contemporary, well informed in official circles, on publishing the text of the Commission, made the following remark: "It

"has been understood that no decision arrived at even by a majority would be binding until it had received the sanction of Parliament. The Commission, however, makes the finding of the Joint Commission absolutely final."

The text of the Commission does not justify such an inference. It only grants the powers belonging to the Crown; consequently the powers of the Commissioners are and must be confined to transacting "*as We Ourselves could do if personally present*;" and Her Majesty engages to ratify the same "*as far as it lies in Our power*."

The Crown has not the right to treat upon every matter which concerns the Empire. In general the Sovereign has sole right to make and ratify treaties; but there are exceptional cases, in which ratification by Parliament is indispensably necessary. The cession of any part of the Canadian fisheries within three miles of the shore, is one of these cases; for these fisheries constitute an integral part of British territory, and no part of that territory can be surrendered in time of peace without the consent of Parliament.

The principle that the fisheries within three miles of the coast belong to the riverain State, is one which is too well established to be seriously called in question; and if any of our readers entertain the slightest doubt upon the point, we refer him to the numerous authorities cited by our esteemed friend Mr. Kerr, in his article on the Fishery Question.\*

The only question, then, to be disposed of is: Can the Crown in time of peace cede to a foreign State any portion of British territory without the sanction of Parliament? The negative is ably maintained by Forsyth in his *Cases and Opinions on Constitutional Law*, pp. 182-187 (ed. 1869); and we deem it sufficient to quote his learned observations in full, feeling assured that under the present circumstances they will be read with deep interest.

"Has the Crown the power by its prerogative to cede British territory to a foreign power, except under a treaty of peace? No doubt ministers who improperly advise such a cession may be impeached, but impeachment is punishment, and cannot invalidate the grant. If it is part of the prerogative of the Crown to cede territory by a simple grant, without any reference to

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\* Supra, pp. 38-63.



" treaty, then a foreign power has the right *jure gentium* to hold  
 " the ceded territory, however improperly it may have been  
 " granted. A treaty concluded with a foreign State by the  
 " President of the United States alone, without the consent of  
 " the Senate, would not, according to the Constitution, be binding  
 " on the nation, and the foreign State would derive no rights  
 " under it; and, in like manner, it may be contended that a  
 " foreign State derives no title to British territory ceded by the  
 " Crown as a free gift in time of peace, without reference to  
 " treaty.

" There is no doubt that it is part of the prerogative of the Crown  
 " to make treaties with foreign powers; and Blackstone lays down  
 " the law correctly when he says that in doing so, 'whatever con-  
 " tracts he (the Sovereign) engages in, no other power in the king-  
 " dom can legally delay, resist or annul.' Wheaton indeed, says  
 " (Internat. Law, s. 542), that in Great Britain the treaty power  
 " is 'practically limited by the general controlling authority of  
 " Parliament, whose approbation is necessary to carry into effect  
 " a treaty by which the existing territorial arrangements of the  
 " empire are altered.' But in the case of treaties of peace fol-  
 " lowing a state of war, there is no doubt that the consent of  
 " Parliament is *not* necessary to enable the Crown to alienate part  
 " of British territory to a foreign contracting power. Kent, in  
 " his Commentaries (vol. 1, p. 175, 10th ed.), says that 'the  
 " power competent to bind the nation by treaty may alienate the  
 " public domain and property by treaty.' The reason of this is,  
 " that if the nation has conferred upon its supreme executive with-  
 " out reserve the right of making treaties, the alienation is valid,  
 " because made by the reputed will of the nation.

" In *Conway v. Gray*, 10 East. 536, the Court said: 'In all  
 " questions arising between the subjects of different states, each  
 " is a party to the public authoritative acts of his own Govern-  
 " ment; and, on that account, a foreign subject is as much in-  
 " capacitated from making the consequences of an act of his own  
 " state the foundation of a claim to indemnity upon a British  
 " subject in a British court of justice, as he would be if such  
 " act had been done immediately and individually by such for-  
 " eign subject himself.' But the authority of this case was  
 " shaken by *Flindt v. Scott* (in Error), 5 Taunt. 677, as ex-  
 " plained by Thomson, C. B., in *Bazett v. Meyer*, Ibid. 829; and  
 " it was overruled by *Aubert v. Gray* (in Error), 32 L. J. (Q.

"B.) 50, where the Court said: 'The assertion that the act of  
 "the Government is the act of each subject of the Government  
 "is never really true. In representative governments it may  
 "have a partial semblance of truth, but in despotic govern-  
 "ments it is without that semblance.'

"Whether the Crown has the power to alienate British territory by treaty, not following the close of a war—as, for instance, by a commercial treaty—does, I confess, seem to me to be extremely questionable. I should doubt much whether the Crown without the authority of Parliament, would have the *legal power* to cede, by treaty, the Channel Islands to France, there having been no war, and the cession not being made as part of the adjustment of a quarrel between the two countries. And to show how cautiously British statesmen have acted where there was a case of novelty with regard to the exercise of the prerogative of the Crown, even as regards peace and war, I may mention that when it was resolved, in 1782, to recognize the independence of the North American Colonies, an Act of Parliament (22 Geo. 3, c. 46) was passed, authorizing the Crown to make peace with the colonies, and to repeal and make void acts of Parliament relating to them. I may mention also, that although, by the Constitutional charter of 1830, the King of France had the power expressly given to him to make treaties of peace; the opinions of French jurists have been that he had not the power of alienating French territory.

"But where there is no treaty, the opinion of jurists seems to be strongly against the supposition of such a power residing in the sovereign, except indeed in a purely despotic form of government; see Grotius de Jure Belli et Pacis, lib. ii, c. 6, ss. 3, 4, 7, 8; Puffendorf, lib. viii, e. 12; Vattel, lib. i, c. 20, s. 224; c. 21, s. 260; Liv. 4, c. 2, s. 11; Phillimore, part iii, c. 14, ss. 261, 262.

"In the debate in the House of Lords on the preliminary articles of peace, January, 1783, (Parl. Hist. vol. xxii, pp. 430-1), Lord Loughborough said, with reference to the cession of East Florida to Spain, that no prerogative existed in the Crown to cede without the authority of Parliament any part of the dominions of the Crown in the possession of subjects under the allegiance and at the peace of the King. He was answered by Lord Thurlow, then Lord Chancellor, who said that if this doctrine were true, he should consider himself strangely ignor-

“ant of the Constitution of his country, for till the present day  
“of novelty and miracle, he had never heard that such a doctrine  
“existed. The learned Lord, Lord Loughborough, resorted to  
“the lucubrations and fancies of foreign writers, and gravely  
“referred their lordships to Swiss authors for an explanation of  
“the prerogative of the British Crown. He, Lord Thurlow,  
“for his own part, rejected all foreign books on the point before  
“them. However full of ingenuity or speculation Mr. Vattel  
“and Mr. Puffendorf might be on the law of nations, and other  
“points which neither were nor could be fixed by any solid and  
“permanent rule, he denied their authority, he exploded their  
“evidence, when they were brought to explain to him what was,  
“and what was not. the prerogative of the British Crown. But  
“we must remember that Great Britain had been at war with  
“Spain, and the cession of Florida was under a treaty of peace;  
“so that the declamatory rhetoric of Lord Thurlow proves  
“nothing for the point we are considering, which is whether by  
“a mere grant, not under a treaty of peace, the crown can by its  
“prerogative cede part of its dominions to a foreign power.

“If such a power resides in the British Crown, we may ask  
“for proofs of its existence by acts done. The only precedent I  
“know of (with the exception of the Orange River Territory, to  
“be noticed hereafter), is the sale of Dunkirk by Charles II, for  
“which Lord Clarendon was impeached, and which can hardly  
“be considered a constitutional precedent now. It would be easy  
“to show that the Crown before the Revolution claimed to exer-  
“cise, and did in fact exercise, prerogatives which were not con-  
“stitutional, and which, independently of prohibitory statutes,  
“would now be disallowed; for instance the claim of the Crown  
“to levy ship-money, the legality of which was, on the authority  
“of precedents, maintained by Attorney-General Noy, and up-  
“held by the judges, but which by the statute 16 Chas. I, c. 14,  
“was *declared* and enacted to be contrary to law. So the claim  
“of the Crown to suspend or dispense with penal statutes by a  
“*non obstante*, as to which Mr. Broom says, in his ‘Constitu-  
“tional Law’ p. 507: ‘The current of authority serves to show  
“that the prerogative of dispensing by *non obstante* with acts of  
“Parliament was, subject to certain restrictions, recognized in  
“former times as vested in the Crown.’ But by the Bill of  
“Rights, it was ‘declared’ that ‘the pretended power of dispens-  
“ing with laws by regal authority is illegal.’ So also the grants

“by the Crown of the right of exclusive trading, as in the case of the East India Company and the Hudson’s Bay Company. In *East India Company v. Sandys*, 10 State Trials, 371, 554, the grant of sole trading was held to be good; but it is difficult to believe that, even independently of the Statute of Monopolies, such a grant would be held to be good now.

“In a debate in the House of Commons, February, 1863, on the question of the relinquishment by the British Crown of the protectorate of the Ionian Islands, it was contended that they were a possession of the British Crown, and Lord Palmerston was asked whether it was competent, according to the Constitution, for the Crown to alienate them without the consent of Parliament. His Lordship answered that the Republic of the Seven Islands was, by the treaty of 1815, placed under the protectorate of the British Crown, and not given as a possession to the British Crown. He said that the distinction was ‘manifest and radical,’ and added: ‘But with regard to cases of territory acquired by conquest during war, and not ceded by treaty, and which are not therefore British freehold, and all possessions that have been ceded by treaty and held as possessions of the British Crown, there is no question that the Crown may make a treaty alienating such possessions without the consent of the House of Commons.’ He then instanced the cases of Senegal, Minorca, Florida, and the island of Banca, ‘all of them for a greater or less period of time possessions of the British Crown, and they were all ceded by treaty to some foreign power, therefore there cannot be a question as to the competency of the Crown to make such cessions.’\* But all these were cases of cession made by treaty of peace at the close of a war, as to which there never was really any doubt that the Crown could do so by virtue of its prerogative. They do not touch the question of whether the Crown has the power where there has been no war, and consequently no treaty of peace.

“It has, I believe, been supposed that a distinction exists between territory acquired by the Crown by conquest or cession which has not been the subject of Parliamentary legislation, and territory to which acts of Parliament have been applied, and it has been thought that the Crown may, by its prerogative, cede the former but not the latter to a foreign power.

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\* Hansard, Parl. Deb. vol. clxiix, p. 230-1.

“ In 1853, a question arose as to the abandonment by the  
 “ Crown of its sovereignty over the Orange River Territory, which  
 “ had been assumed by proclamation of the Governor, and under  
 “ the public seal of the colony of the Cape of Good Hope, in  
 “ 1848. By letters patent, under the great seal, dated March,  
 “ 1851, Her Majesty ordained and appointed that the said terri-  
 “ tory should become and be constituted a distinct government to  
 “ be administered by the Governor of the Cape, and that it should  
 “ thenceforth be known by the name of the Orange River Terri-  
 “ tory. In 1854, the Duke of Newcastle, who was then Secretary  
 “ for the Colonies, wrote to Sir George Clerk, the Governor of  
 “ the Cape, and informed him that Her Majesty’s Government  
 “ had come to the conclusion, that the abandonment of the Orange  
 “ River sovereignty could be legally and most conveniently effected  
 “ by an Order in Council and proclamation. The letters patent  
 “ of March, 1851, were accordingly revoked by other letters pa-  
 “ tent, and the Queen, by Order in Council, dated January 30,  
 “ 1854, approved of a proclamation, whereby Her Majesty did  
 “ declare and make known the abandonment and renunciation of  
 “ our dominion and sovereignty over the said territory and the  
 “ inhabitants thereof.\*

“ There are two instances of cession (independently of treaty at  
 “ the conclusion of a war) by the East India Company to a foreign  
 “ State previously to the Indian mutiny :

“ 1. In 1817, a cession by *treaty*, ‘ in full sovereignty,’ to the  
 “ Sikhimputtee Rajah of a part of territory formerly possessed by  
 “ the Rajah of Nepaul, but taken by the East India Company,  
 “ and ceded to them by a treaty of peace.

“ 2. In 1833, a cession by *treaty*, to Rajah Voorunder Singh,  
 “ of a portion of Assam, lying on the south of the Burrampooter  
 “ River, by which the Rajah bound himself, ‘ in the administra-  
 “ tion of justice in the country now made over to him, to abstain  
 “ from the practices of the former rajahs of Assam, as to cutting  
 “ off ears and noses, extracting eyes, or otherwise mutilating or  
 “ tormenting.’ †

“ This is not a very satisfactory precedent, and it shows the  
 “ kind of risks to which British subjects might be liable in being

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\* See Correspondence on the State of the Orange River Territory, presented to Parliament, April 10, 1854.

† Treaties, Engagements and Sunnuds, vol. 1, p. 132.

“ transferred to a semi-barbarous power. But I may add, that in that case the Rajah agreed to pay a large annual tribute, so that he became a sort of feudatory of the Company. Since the mutiny there have been several instances of cession of territory in India by grants, as rewards to native chiefs for fidelity to the British government. And as to these it may be said that Indian necessities are peculiar, and cannot be judged of by European precedents. It is not, as generally with us, a foreign enemy, but it is the hostility and disaffection of the native population, a population enormously outnumbering the English, which may produce dangers quite as imminent and urgent, during apparent peace, as a foreign European war, and it may be urged that European precedents cannot be strictly applied to a state of things wholly different. It is right also to mention that boundary treaties have been made by the Crown, without the authority of Parliament, and those treaties have in effect altered the nationality of territory to a certain extent, as in the case of the Washington Treaty in 1842, and the Oregon Treaty in 1846.

“ If cessions of territory by mere grant are valid, what becomes of the allegiance of the inhabitants? The rule of Roman law is thus stated by Cicero: ‘Jure enim nostro neque mutare civitatem quisquam invitus potest, neque si velit, mutare non potest, modo adsciscatur ab eâ civitate cujus esse se civitatis velit.’ *pro Balbo*, 11. It seem to be clear that the Crown cannot by its prerogative alone release subjects from their allegiance nor *e converso* deprive them of the rights of British subjects. In the despatch of the Duke of Newcastle to which I have already referred, his Grace said: ‘with respect to the allegiance of the inhabitants who may have been born in British dominions either within or without the sovereignty, there is, I believe, little doubt that no measure resting on the Queen’s prerogative only for its authority, could release them from the tie of such native allegiance. An Act of Parliament would be required for such a purpose. But, for the reasons already adverted to in my despatch of November 14 last, I do not consider it necessary to apply to Parliament on this ground. It is probable that the inhabitants of the future commonwealth would generally prefer to retain the rights of British subjects rather than become wholly aliens, and subject to the ordinary incapacity of aliens within Her Majesty’s dominions.’ This part of the subject, however, will be more fully considered in the chapter “on Allegiance.”

Is not the fact that an Act of Parliament was necessary to give effect to the naturalization in the United States of emigrant British subjects, a proof that the Crown cannot cede any part of its territory without the sanction of Parliament? For it cannot be denied that a cession of territory includes in most instances a transfer of allegiance.

It would be a gross error to suppose that, in relation to the Crown, Canada stands on a different footing from the United Kingdom. "When the Crown," says Forsyth,\* "has once granted a legislature to a conquered or ceded colony, it cannot afterwards exercise with respect to such colony its former power of legislation, *Campbell v. Hall*, Cowp. 204, 20 State Tr. 389 . . . . . After a colony or settlement has received legislative institutions, the Crown (subject to the special provisions of any Act of Parliament) stands in the same relation to that colony or settlement as it does to the United Kingdom: *Re Lord Bishop of Natal*, 3 Moore, P. C. (N. S.) 148."

The Parliament whose sanction would be requisite to render valid a surrender of the Canadian Fisheries, in time of peace, is undoubtedly that of Canada—not indeed *stricto jure* but *proprio jure*, on grounds of justice and public policy—for those fisheries form part of the territory subject to its jurisdiction. "The jurisdiction of colonial legislatures," says Forsyth,† extends to three miles from the shore. In an opinion given by the law officers of the Crown, Sir J. Harding, Queen's Advocate, Sir A. E. Cockburn, Attorney-General, and Sir R. Bethell, Solicitor-General, with reference to British Guiana, February, 1855, they said: "We conceive that the colonial legislature cannot legally exercise its jurisdiction beyond *its territorial limits—three miles from the shore.*"

It is reasonable and just that the Imperial Parliament should not exercise the power, which it may possess, of ratifying a cession of our fisheries. It is an acknowledged maxim of natural and of modern public law, that no person can be subjected to the action of a legislature in which he is not represented. The interference of the Imperial Parliament would not only be a violation of this natural and public law, but would be, moreover, an act of supreme contempt for the Legislature of Canada.

For many years the policy of England has been, not to make

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\* Constitutional Law, p. 16.

† Ibid p. 24

any change in the status of a colony or to dispose of its territory in any way without the consent of the colonial legislature. The course pursued at the time of enacting the British North America Act, 1867, and that now pursued with respect to Newfoundland, Prince Edward's Island and British Columbia, are striking proofs of this policy.

It may therefore safely be laid down that the Crown has no more right to cede any part of the Canadian territory than to cede a part of the United Kingdom, without the consent of the Canadian Parliament, or at all events of the Imperial Parliament. A surrender, therefore, of any part of the Canadian fisheries, at least in time of peace, would require the sanction of one of these Legislatures.

D. GIROUARD.

MONTREAL, April 10th, 1871.

#### A NOS LÉGISLATEURS.

Le mode de procédure suivi dans nos cours criminelles pour prendre par écrit les témoignages est, à mon avis, très peu satisfaisant. En supposant même le Juge impeccable, on n'a tout au plus que des notes, des tronçons du témoignage et non pas *verbatim* tout ce que le témoin a dit. Mais la supposition que le Juge ne commet pas d'erreurs en prenant ses notes, n'est-elle pas extrêmement gratuite et contraire à l'expérience? Ne faudrait-il pas supposer aussi qu'il cesse d'être homme et emprunte les attributs de la Divinité en devenant Juge? Il n'y a rien d'étonnant si ces notes contiennent des inexactitudes, des omissions, des erreurs, plus ou moins importantes. Le Juge est obligé de surveiller, de voir et d'entendre à la fois tout ce qui se passe pendant le procès, de prêter l'oreille à une objection que fait tout à coup l'un des avocats, de réprimer les interruptions d'un autre, de constater si les Jurés entendent le témoin, de critiquer, s'il y a lieu, la traduction que fait l'interprète, *etc. etc.*, et l'on veut qu'en sus de tant d'occupations différentes où son esprit et ses sens se trouvent engagés, il fasse de plus l'ouvrage d'un simple écrivain, et cela sans faire d'erreur! L'honorable Juge, malgré tous ses talents et toute sa science,—pour une raison ou pour une autre, soit par la faute du témoin qui ne parle pas assez fort, soit



par la faute des avocats ou de l'interprète qui occupent son attention,—saisira mal quelquefois une réponse importante, tout en croyant sincèrement qu'il a bien entendu ; et cette note du témoignage prise incorrectement pourra avoir des conséquences désastreuses. Entr'autres erreurs de ce genre dont j'ai été témoin pendant ma courte expérience, je n'en mentionnerai qu'une faite par un de nos juges les plus éminents et les plus distingués en matières criminelles, mais c'était un erreur grave qui faisait une différence du tout au tout dans la cause ; le Juge avait écrit "*he did say,*" tandis que le témoin avait dit "*he did not say.*" La petite mais extrêmement importante particule "*not*" avait échappé à l'attention généralement très scrupuleuse du Juge, et il était bien convaincu qu'il avait raison. Le Juge bien entendu fit sa charge au Juré conformément à sa note, et bien entendu aussi le Conseil de l'accusé réclama énergiquement, et ce ne fut qu'après beaucoup de difficultés et après un échange d'observations plus ou moins désagréables que le Juge consentit, après que le Juré se fût retiré, à faire revenir le témoin et à accepter une rectification dont dépendait le sort de l'accusé. Mais les Juges ne consentent pas toujours à faire revenir le témoin (et peut-être ont-ils raison de soupçonner quelquefois que le témoin bienveillant serait disposé à venir contredire ce qu'il a dit précédemment) ; le verdict est rendu et le procès se termine en laissant dans l'esprit du plusieurs la conviction désagréable que le Juge dans sa charge au Juré n'a pas dit ou a dit le contraire de ce que le témoin avait déposé.

La système, que je suggère humblement, débarrasserait le Juge d'un travail manuel que la loi lui impose injustement, et ce système, bien qu'on ne puisse pas le considérer comme étant la perfection même, est suivant moi sujet à beaucoup moins d'inconvénients. Je l'ai vu pratiqué dans une des causes les plus célèbres qui se soient plaidées dans le pays voisin, et il ne laisse, ce me semble, rien à désirer : c'est d'employer pour faire le rapport légal des témoignages un sténographe habile et d'une intégrité reconnue, qui comme officier de la cour, serait sous serment, et qu'une rémunération libérale mettrait à l'abri de tout soupçon de corruption. Le sténographe, s'il connaît bien son art et s'il veut faire son devoir, est une machine dont l'exactitude ne peut être mise en doute ; toutes les paroles du témoin seront saisies et couchées par écrit, et on aura non seulement des notes, mais tout le témoignage dans le langage même du témoin mot-à-mot. Cet

employé, n'ayant que cela à faire, ne serait pas sujet aux nombreuses causes de distraction qui sont pour le Juge, pour ainsi dire, inévitables; et celui ci aurait en même temps, comme Président de la Cour, plus de liberté et de loisir pour surveiller, guider et juger. Rien n'empêcherait le Juge de prendre notes des plus importantes parties du témoignage pour aider sa mémoire dans sa charge au Juré. Mais je voudrais que le rapport légal des témoignages fût fait par un employé spécialement nommé, assermenté et payé pour cela, et qu'on en référât à lui dans tous les cas d'objections ou de doute. Une objection survient tout à coup pendant le procès; on prétend que tel témoin a dit ou n'a pas dit telle ou telle chose; avec notre système actuel, de fâcheuses récriminations s'en suivent presque nécessairement entre le juge et l'avocat; le soupçon d'inexactitude blesse l'amour-propre du juge et le désavantage est naturellement du côté du malheureux avocat et de son pauvre client; le juge est maître de la position; il peut d'un mot mettre fin à la discussion et passer outre. Mais avec le système que je propose tous ces inconvénients disparaissent; pour résoudre la difficulté le juge ordonne au sténographe de lire le témoignage ou la partie du témoignage en question, et tout est dit; l'exactitude de cette machine sténographique est telle qu'on ne va pas généralement plus loin; et si l'on pousse l'opiniâtreté jusqu'à demander le retour du témoin dans la boîte, l'expérience démontre qu'il confirme presque invariablement l'exactitude textuelle du rapport que l'officier a fait de son témoignage.

Je sou mets respectueusement à qui de droit l'opportunité des changements que je propose. Ce système n'est pas, comme on le sait, une invention de ma part; je l'ai vu fonctionner ailleurs très bien et à la satisfaction de tous. C'est un progrès que l'on n'aurait, j'en suis convaincu, aucune raison de regretter, s'il était adopté. Du reste, j'invite cordialement la discussion sur ce point.

E. RACICOT.

SWEETSBURGH, 7 février 1871.

## JURISPRUDENCE COMPARÉE

DE LA  
COUR D'APPEL.I.—*Droit d'appel.*

L'article 1142 du Code de Procédure Civile dit: Il y a appel de tout jugement de la Cour de Circuit "lorsque la somme ou la valeur de la chose demandée est de cent piastres ou plus." Le statut ajoute que le droit d'appel se détermine par le montant demandé et non par celui accordé. 20 Vict. c. 44, s. 60.

1o. Il n'y a pas d'appel de tout jugement de la Cour de Circuit, quand le montant demandé excède £25.

Le droit d'appel se détermine par le montant accordé et non par celui demandé.

Per Duval, Caron, Badgley et Monk.

*Bellerose et Hart*, 8 juin 1869. 1 Revue Légale, 157.

L'article 1115 dit: "Il y a appel au même tribunal de tout jugement final rendu par la Cour Supérieure."

2o. Sur l'appel d'un jugement final de la Cour Supérieure condamnant le défendeur à payer \$30, jugement fut rendu le 8 septembre 1870, à l'unanimité des juges, dans le sens de *Bellerose et Hart*; mais il fut retiré deux jours après avoir été prononcé; et au terme suivant, la Cour (Duval, J. C. dissident) rendit un jugement contraire au premier et décida qu'il y a appel de tout jugement final de la Cour Supérieure.

*McCarthy et Lafond*, décembre 1870.

1o. Il y a appel de tout jugement de la Cour de Circuit, quand le montant demandé excède £25.

Le droit d'appel se détermine par le montant demandé et non par celui accordé.

Per Duval, Caron, Drummond, Badgley et Monk.

*Gutman et La Compagnie du Grand Tronc*, 1 déc. 1870.

2o. Il n'y a pas d'appel d'un jugement final de la Cour Supérieure, de la part d'une partie qui se plaint seulement qu'on lui a refusé des frais, quel que soit le montant de ceux-ci. L'appel interjeté en ce cas sera renvoyé, même si la partie adverse ne le demande pas.

Per Duval, Caron, Badgley et Drummond.

*Fillion et Le Séminaire de Québec*, "Q" 19 septembre 1868.

30. Il y a appel d'un jugement rendu en Chambre sur une demande de sequestre, le juge pouvant la recevoir comme la cour, suivant l'article 876.

Per Duval, Caron, Drummond, Badgley et Monk.

*Dambourgès et Morison*, 10 juin 1869.

30. Il n'y a pas appel d'un jugement rendu par un juge en Chambre, même sur une demande de sequestre; cet appel n'a lieu que des jugements de la cour.

Per Duval, Caron, Drummond, Badgley et Monk.

*Blanchard et Miller*, 10 mars 1871.

L'article 1178, par. 3, dit: "Il y a appel à Sa Majesté en Son Conseil Privé de tout jugement final rendu par la Cour du Banc de la Reine, en appel, dans toute cause où la matière en litige (in dispute) excède la somme ou valeur de £500 stg."

Jugé par le Conseil Privé:

10. Que pour déterminer la valeur de la matière en litige, il faut considérer le montant du jugement aussi bien que celui de l'action.

20. Que pour déterminer la valeur de la matière en litige, il faut considérer les intérêts accrus depuis le jour de l'institution de l'action.

*Kilborn et Boswell*, 7 L. C. Jur. 150; 13 Moore P. C. 477.

40. Pour juger de la valeur de la matière en litige, il ne faut pas avoir égard au montant réclamé par l'action, mais à celui accordé par le jugement.

Duval, Caron, Drummond, Badgley et Monk.

*Burland et Larocque* 4 septembre 1869.

40. Pour déterminer s'il y a appel au Conseil Privé il faut uniquement considérer le capital demandé. Il ne faut pas considérer, dans la computation des £500, les intérêts accrus depuis la jour de l'institution de l'action.

Duval, Caron, Drummond, Badgley et Monk.

*Wilson et Demers*, "Q,"\* 18 septembre 1870.

*Voyer et Richer*, "Q," 18 septembre 1870.

Mêmes juges, Mr. le juge Monk ne siégeant pas.

\* Tout décision indiquée "Q" a été prononcée à Québec, et toute autre non ainsi indiquée a été rendue à Montréal.

Permission d'appeler ayant depuis été demandée directement à Sa Majesté en Son Conseil Privé, l'appel fut accordé sur le seul principe qu'il faut considérer les intérêts accrus depuis le jour de l'action aussi bien que le capital.

*Voyer et Richer* P. C. 8 février 1871.

## II.—*Cautionnement en appel.*

50. Le cautionnement, dans les appels de la Cour de Circuit, doit, à peine de nullité, mentionner une somme déterminée pour laquelle les cautions se sont rendues responsables.

Per Duval, Drummond et Badgley. Caron, diss.

*La Fabrique de Ste. Julie et Pâquet*, "Q," 20 juin 1868.

60. On doit y annexer les affidavits par lesquels des cautions ont justifié de leur solvabilité; sinon, le cautionnement sera rejeté, même si l'Intimé n'a pas invoqué cette cause de nullité.

Même cause.

50. Il n'est pas nécessaire que le cautionnement, dans les appels de la Cour de Circuit, mentionne une somme déterminée pour laquelle les cautions se sont rendues responsables.

Per Duval, Caron, Badgley, Monk et Mackay.

*La Fabrique de Ste. Julie et Pâquet*, "Q," 14 déc. 1868.

60. Les affidavits de justification des cautions n'ont pas besoin d'être annexés au cautionnement.

Per Duval, Caron, Drummond, Badgley et Monk.

*Gingras et Veer*, "Q," 20 septembre 1868.

## III.—*Certificat de la transmission du transcript.*

L'article 1181 de notre Code de Procédure Civile dit: "L'exécution du jugement de la Cour du Banc de la Reine ne peut non plus être arrêtée ou suspendue après six mois à compter du jour auquel l'appel est accordé, à moins que l'appelant ne produise au greffe des appels, un certificat du greffier du Conseil Privé de Sa Majesté, ou de tout autre officier compétent, constatant que l'appel y a été logé dans ce délai et que des procédures ont été adoptées sur cet appel."

70. "Considérant que les *appellants* n'ont point produit "au greffe des appels, dans le "délai de six mois à compter "du jour auquel un appel à Sa "Majesté en Son Conseil Privé "leur a été accordé, savoir à

70. *La partie* qui interjette appel au Conseil Privé doit bien transmettre le dossier dans les six mois qui suivent le jour où elle a obtenu la permission d'interjeter appel, mais elle n'est pas obligée de produire dans ce dé-

“compter du neuvième jour de  
 “décembre dernier, un certificat  
 “du Greffier du Conseil Privé  
 “de Sa Majesté, ou de tout  
 “autre officier compétent, cons-  
 “tatant que l'appel y a été  
 “logé dans ce délai, et que des  
 “procédures ont été adoptées  
 “sur le dit appel, etc.”

Per Duval, Caron et Drum-  
 mond. Badgley, diss.

*Morrison et Dambourgès*, 10  
 juin 1869.

lai à la Cour d'appel un certifi-  
 cat constatant la transmission.

Per Duval, Aylwin, Caron,  
 Drummond et Badgley.

*Evanturel et Evanturel*, 20  
 décembre 1867.

“Vu enfin que rien n'oblige  
 “les appellants à établir par  
 “certificat ou autrement que  
 “le dossier est parvenu à sa  
 “destination en temps opportun  
 “et y a été légalement déposé  
 “et admis, etc.”

Caron, Drummond, Badgley  
 et Monk.

*Morrison et Dambourgès*, 9  
 décembre 1869.

#### IV.—*Exécution provisoire des jugements dont il y a appel au Conseil Privé.*

*Principe Général* : “Cette cour, étant dessaisie de la présente  
 “cause (par l'appel au Conseil Privé) n'a ni autorité ni juridic-  
 “tion pour y donner ou rendre aucun ordre ou jugement quelcon-  
 “que.”

Caron, Drummond, Badgley et Monk.

*Morrison et Dambourgès*, 9 déc. 1869. La même doctrine  
 est consacrée dans une cause de *The Montreal Assurance Com-  
 pany et McGillivray*; Per LaFontaine, Aylwin, Duval et Mon-  
 delet, 3 septembre 1860, 10 L. C. Rep. 385; et aussi en cause  
 de *Herse et Dufaux*, *Infrà*, No. 10, et de *Muir et Muir*, mars  
 1871.

80. Quoique le certificat re-  
 quis par le statut ne soit pas  
 produit dans les six mois, cette  
 cour peut refuser l'exécution  
 provisoire, et elle est justifiable  
 de le faire quand le transcript a  
 été certifié et envoyé.

Duval, Drummond, Badgley  
 et Mondelet.

*Jones et Lemoine*, 6 juin  
 1867, 17 L. C. Rep. 377.

80. Si le certificat requis n'est  
 pas produit dans les six mois,  
 cette cour ne peut refuser l'exé-  
 cution provisoire dans aucune  
 circonstance.

Duval, Caron et Drummond;  
 Badgley, diss.

*Morrison et Dambourgès*, 10  
 juin 1869.

90. Cette cour ne peut, pendant l'appel au Conseil Privé, se dessaisir du dossier et le renvoyer à la Cour Supérieure, pour faire exécuter le jugement provisoirement, bien que le certificat du C. P. ne fut pas transmis.

Aylwin, Drummond, Badgley et Mondelet.

*Jones et Lemoine*, 7 décembre 1866.

100. Durant l'appel au Conseil Privé, cette cour est dessaisie de la cause et ne peut s'enquérir de l'insolvabilité des cautions, survenue depuis l'appel, ni exiger de nouvelles cautions.

Per Duval, Caron et Drummond; *contrà* Badgley & Monk.

*Herse et Dufaux*, 8 juin 1870.

80. Cette cour peut, pendant l'appel au Conseil Privé, se dessaisir du dossier, et le renvoyer à la Cour Supérieure, pour faire exécuter le jugement provisoirement, bien que le certificat du C. P. ne fut pas transmis.

Duval, Caron et Drummond; Badgley, diss.

*Morrison et Dambourgès*, 10 juin 1869.

100. Que durant l'appel au Conseil Privé, cette cour, quoique dessaisie de la cause, peut s'enquérir de l'insolvabilité des cautions et en ordonner de nouvelles; mais cette cour n'a pas le droit de donner suite à son jugement et d'ordonner le renvoi de l'appel, à défaut de nouvelles cautions.

Duval, Caron, Drummond, Badgley & Monk.

*Johnson et Connolly*, 9 mars 1871.

#### V.—*Prescription.*

110. Rien, pas même une reconnaissance expresse et par écrit de la dette, ne peut suspendre la prescription de cinq ans des billets promissaires.

Per Duval, Meredith, Drummond et Mondelet; Aylwin diss.

*Fenn v. Bowker*, 10 L. C. J. p. 121. (1866.)

110. La prescription de cinq ans des billets promissaires peut être interrompue; l'impossibilité où était le créancier de poursuivre son débiteur est une cause d'interruption suivant la maxime: "*contrà non valentem agere non currit præscriptio.*"

Per Duval, Caron, Badgley et Monk.

*Wilson v. Demers*, 7 septembre 1870; 14 L. C. J. 317

120. Jugé que la maxime :  
 “ *Contrà non valentem agere non currit præscriptio* ne s’applique pas à la prescription d’un an stipulée dans une police d’assurance.

*Browning et The Provincial Assurance Company, C.S.* Per Beaudry, J. Jugement confirmé en appel purement et simplement.

Per Duval, Caron, Badgley et Monk; 10 mars 1871.

#### VI.—Décret.

130. Cette cour avant la mise en force du Code de Procédure Civile décida que l’adjudicataire d’un immeuble désigné comme contenant 400 arpens, lorsqu’en réalité il n’en contenait que 188 a droit de recouvrer l’excédant du prix qu’il a payé.

*Desjardins et La Banque du Peuple*, 8 L. C. J., p. 106.

Per Sir LaFontaine, Mondelet et Badgley; Aylwin et Duval, diss.

*Doutre & Elvidge*, 10 décembre 1870.

Per Duval, Monk et Loranget; *contrà*, Caron et Badgley.

Aucun des articles du Code n’est indiqué comme de droit nouveau. De plus le Code n’a pas prévu le cas où la contenance est donnée dans la saisie de l’immeuble; il ne parle que des saisies de corps certains par numéros ou par *tenants et aboutissants* s’il n’y a pas de cadastre dans la localité.

130. Depuis le Code de Procédure Civile, la vente du Shérif est sans garantie de mesure, quand même cette mesure serait indiquée dans les annonces et dans le titre du shérif; et l’adjudicataire d’un emplacement de ville désigné comme contenant 10,725 pieds lorsqu’en réalité il n’en contient que 7738, soit une différence en moins de 2987 pieds, n’a droit à aucune diminution du prix.

Per Duval, Caron et Badgley; *contrà*, Drummond et Monk.

*Melançon et Hamilton*, 10 mars 1871.



140. L'article 1585 du Code Civil dit : " Dans les ventes judiciaires sur exécution, l'acheteur, au cas d'éviction, peut recouvrer le prix qu'il a payé avec les intérêts et les frais du titre; il peut aussi recouvrer ce prix avec intérêt des créanciers qui l'ont touché, sauf leur exception aux fins de discuter les biens du débiteur."

140. Jugé que cet article ne s'applique qu'au cas d'éviction totale et non à celui d'éviction partielle.

Même cause.

#### VII.—*Preuve du don manuel.*

L'article 776 du Code Civil dit : " La donation des choses mobilières, accompagnée de délivrance, peut être faite et acceptée par acte sous seing privé ou par convention verbale."

150. La preuve testimoniale des dons manuels accompagnés de livraison, est admissible.

*Mahoney et McCready*, 15 L. C. Rep. 275.

Per Duval, Meredith, Drummond, Mondelet et Badgley.

*Colville et Flanagan*, 8 L. C. Jur. 225.

Per Duval, Meredith, Mondelet et Badgley.

150. La preuve testimoniale du don manuel accompagné de livraison n'est pas admissible.

Duval, Caron, Drummond, Badgley et Loranger.

*Voyer et Richer*, 7 septembre 1870.

#### *Tableau.*

160. La motion de l'Intimé pour renvoi de l'appel faute de la production des raisons d'appel est accordée quant aux frais seulement.

Duval, C. J., pour la Cour.

*McMillan et Buchanan*, 6 mars 1871.

160. La motion de l'Intimé pour renvoi de l'appel faute de la production des raisons d'appel est rejetée sans frais.

Duval, C. J., pour la Cour.

*McMillan et Buchanan*, 8 mars 1871. Sur l'observation de l'avocat de l'Intimé que jugement avait été rendu deux jours avant, lui accordant les frais de sa motion, le jugement du 8 mars est retiré.

LE SECRÉTAIRE DE LA RÉDACTION.

### "THE AMERICAN LAW REVIEW" ON THE FISHERY QUESTION.

In the April number of *The American Law Review*, appeared an article on "The North Eastern Fisheries." In the January number of *La Revue Critique*, the same subject was discussed, and it would not so soon have been reverted to had the article in the *Law Review* dealt solely with acknowledged principles of law, but some of its propositions are so very new, extraordinary, and startling, that they demand instant examination.

At page 416 of the *Law Review* appear these words: "We shall now inquire whether the Convention of 1818 is an existing compact; and if not, what are the rights of American fishermen under the treaty of peace of 1783." The result of the inquiry is announced at page 419: "Applying these well established principles to the facts under discussion, and the conclusion is inevitable. The Convention of 1818 contained a renunciation of, a limitation and restriction upon, the otherwise full enjoyment of rights created in 1783. The renunciation, limitation, and restriction were wholly removed, and in place thereof affirmative provisions were substituted. These latter were finally annulled, and there is now left no compact between the two governments interfering with Article III. of the Treaty of 1783. The result is the same as though the United States and Great Britain had simply and directly abrogated the clause of renunciation contained in Article I. of the Convention of 1818."

The portion of the article in question referring to the effect produced on Article III. of the Treaty of 1783, by Article I. of the Convention of 1818, hardly requires discussion, as the elaborate argument on pages 418 and 419, if well founded, shows conclusively that the Convention of 1818 novated Article III. of the Treaty of 1783. But, moreover, the Convention of 1818 was in the nature of the *transactio* of the Roman law, and fixed the rights of the parties.\*

Are the words "And the United States hereby renounces for ever any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish on or within three marine

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\* Mackeldey, *Man. de Droit Romain*, § 470.

"miles of any of the coasts, &c.," of no avail against the words of the treaty of 1783? Did they not in plain terms annihilate any right or liberty which might at any time have been in existence, either enjoyed or claimed by the inhabitants of the United States, to fish, &c., within the limits specified in the renunciatory clause?

In that portion of the article which treats of the effect produced by the Treaty of 1854 on the Convention of 1818, the propositions advanced are startling in their novelty. "It is the case," says the learned writer, "which often arises in the municipal law of substituting one contract for another, by which the prior one is swallowed up, and ended, and the latter alone is left binding upon the parties."

The Convention of 1818 fixed the rights of American citizens in the Canadian fisheries, the reciprocity treaty, in consideration of certain commercial advantages extended to Canadians, gave to American citizens the liberty, in common with British subjects, to take fish in Canadian waters for the term of ten years after it went into operation, and further until twelve months after either party should give notice of intention to terminate it. The reciprocity treaty, then, was in its nature merely temporary, in contradistinction to the Convention of 1818, which was perpetual. Either party had the power, after the expiration of ten years from its coming into force, to terminate it by giving a year's notice, consequently it was a contract with a resolute condition (*condition résolutoire*). With all due deference to the writer in the *Law Review*, it is impossible to admit his sweeping assertion that treaties "are interstate contracts, and the doctrines of International Law relating to them are borrowed entire and unchanged from the corresponding departments of municipal jurisprudence." Where in the mazes of American jurisprudence are we to seek for the corresponding department in this case? Is Massachusetts the blessed State where jurisprudence pure and undefiled is to be found? or does New York with its famed judiciary, furnish municipal jurisprudence of undoubted worth? or are we to seek for it before the United States Courts? The only jurisprudence which is of authority in such case is that of the Civil Law, and from the source of all municipal laws on the subjects of contracts, must be drawn the principles governing the question now raised.\*

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\* Heffter, § 90; Bluntschli, § 450.

The 1183 article of the Code Napoleon thus declares the provisions of the Civil Law affecting contracts containing a resolute condition "La condition resolutoire est celle qui, lorsqu'elle s'accomplit, opère la revocation de l'obligation, et qui remet les choses au même état que si l'obligation n'avait pas existé, &c."

Article 1088 of the Civil Code of Lower Canada is in the following words declaratory of the Civil Law "a resolute condition, when accomplished, effects of right the dissolution of the contract. It obliges each party to restore what he has received, and replace things in the same state as if the contract had not existed; subject nevertheless to the rules established in the last preceding article with respect to things which have perished or been deteriorated."\*

In this case then it is clear that on the termination of the treaty of 1854, Great Britain and the United States stood to each other, as regards the Canadian Fisheries, precisely in the position they occupied previous to that treaty coming into force, that is to say bound by the provisions of Article I of the Convention of 1818.

Want of space prevents the further enumeration of the proposition relating to the novation (erroneously styled payment in the article referred to) of the Convention of 1818. But no doubt can be entertained that it is as erroneous as the proposition therein advanced of the non-novation of the fishery article of the Treaty of 1783 by article I of the Convention of 1818.

WILLIAM H. KERR.

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\* See Pothier Obligns. Nos. 224, 672; 4 Marcadé § 564; 3 Massé Dr. Com. Nos. 1795, 1797; Story on Con. § 977; 2 Fiore, p. 58.

## SOMMAIRE DES DÉCISIONS RÉCENTES.

## DÉCISIONS CANADIENNES.

## COUR D'APPEL.

Montréal, 9 mars 1871.

*Forgie & al. et The Royal Insurance Company.*—Jugé qu'une police d'assurance devient caduque par le transport de la matière assurée, à moins que ce transport ne soit fait avec le consentement exprès ou tacite de l'assureur. Per Duval, C.J.; Caron, Drummond et Badgley, JJ.; Monk, J., dissident quant à l'appréciation de la preuve sur le consentement tacite.

*Lemoine et Lionais.*—Jugé que cette cour ne peut ordonner qu'aucune partie du dossier, quelque inutile qu'elle soit, soit omise du transcript, sans le consentement des parties. Tous les juges à l'unanimité.

*McCormick et Buchanan.*—Jugé que l'assistance du mari à une demande judiciaire constitue une autorisation suffisante à la femme de poursuivre ses droits, sans les mots *autorisée par son dit mari à l'effet des présentes*. Tous les juges à l'unanimité.

*McAndrews et Rowan.*—Jugé que cette cour ne peut rendre jugement sur le consentement des parties. Mêmes juges.

*Spelman et Robidoux.*—Jugé que le défaut partiel de considération d'un billet ne peut être l'objet d'une défense à une action. Mêmes juges; Badgley, diss.

Montréal, 10 mars 1871.

*Benning & al. et Cook.*—Jugé que l'acquéreur à une vente du shérif et premier créancier hypothécaire d'un navire enregistré ne peut prétendre qu'un créancier hypothécaire subséquent ne peut saisir-revendiquer le navire sans offrir le montant de cette première hypothèque. Le premier créancier hypothécaire doit attendre l'ordre de distribution. Mêmes juges.

*Bourassa et McDonald.*—Jugé que le bailleur de fonds qui a saisi l'immeuble vendu dans le délai fixé pour le renouvellement des hypothèques suivant le cadastre, mais qui n'a pas renouvelé son hypothèque de bailleur dans ce délai, perd son droit de priorité à l'encontre d'un créancier hypothécaire subséquent qui a renouvelé son hypothèque dans le délai prescrit. Badgley diss.

*Torrance & al. et The Bank of British North America.*—Jugé 10. Que sur une motion nonobstant le verdict, où par conséquent il s'agit de l'insuffisance du droit de la demande, la cour suivant la pratique anglaise, doit la rejeter et maintenir le jugement sur le mérite, à moins

que l'insuffisance du droit de la demande soit très-claire. 2o. Que si un effet de commerce, v. g. une lettre de change, chèque, &c., est livré à A dans un but spécial en faveur de B, A ou toute autre personne ayant connaissance de son objet, doit l'employer à ce but spécial sous peine de payer ce montant à B. 3o. Que si une partie refuse de produire un écrit qui peut jeter du jour sur un procès, la présomption sera en faveur de l'autre partie qui peut établir un *prima facie* droit. Per Duval, C. J., Caron et Badgley, JJ.; *contrà* Drummond et Monk.\*

#### COUR DE RÉVISION.

Montréal, 30 janvier, 1871.

*Le Procureur Général, pro Regina, vs. Hon. J. H. Gray & al.*—Jugé qu'un défendeur, qui, ayant plaidé une exception préliminaire, plaide au mérite sans en être requis, n'est pas censé par là même avoir renoncé à son exception préliminaire. Mondelet, Berthelot et Mackay, J. J.

*Le Procureur Général vs. La Corporation du Comté de Compton.*—Jugé que la couronne n'a pas plus de droit d'appel que les sujets, la juridiction des tribunaux étant déterminée par la législation. Mêmes juges.

*Clarke v. Brean et Cornell & al, opposants.*—Jugé que suivant les articles 2017 du Code Civil et 734 du Code de Procédure Civile, les frais en appel encourus sur le recouvrement d'une hypothèque ne sont colloqués que suivant la date de leur enrégistrement.

*Childerhouse v. Bryson.*—On ne peut produire une défense en droit à une action sur billet promissoire *sans conclusions*, la déclaration et le bref d'assignation y suppléant. Mêmes Juges.

*Long v. Brooks.*—La garantie suivante adressée au demandeur Long: "Please let Mr. Holmes have whatever doors, sashes, &c., he may want, and I will settle for the same," ne s'applique qu'aux avances par Long à Holmes pour le parachevement de la maison alors en voie d'érection, et non aux constructions commencées subséquentement. Mêmes Juges.

*Cross v. Judah.*—Jugé 1o. que quiconque est troublé dans la possession d'une servitude dont il a joui pendant un an et un jour, ne peut intenter l'action possessoire sans alléguer et produire son titre; car pas de servitude sans titre; 2o. Que quand le droit de servitude est douteux en vertu du titre, le doute doit être donné en faveur de l'immeuble servant. Mêmes Juges.

*Hamilton v. Kelly.*—Jugé 1o. que la vente judiciaire d'un bâtiment enrégistré ne purge pas les hypothèques régulièrement inscrites avant la vente; 2o. que nonobstant cette vente, le créancier hypothécaire a son droit de suite par saisie conservatoire.

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\* Il y a appel de cette décision au Conseil Privé.

Montréal, 22 mars 1871.

*Corse v. The British America Insurance Co.*—Jugé qu'une police d'assurance ne peut être transportée que du consentement de l'assureur. Un avis de ce transport n'a pas l'effet de lier l'assureur. Mondelet, Berthelot et Mackay, J. J.

### COUR SUPÉRIEURE.

Montréal, 30 janvier, 1871.

*In Re Benjamin Hutchins & al.*, Requérents pour décharge et *Jeffery & al.*, Contestants.—Jugé que dans une composition avec les créanciers d'une société commerciale et les créanciers des associés individuellement, les créanciers des deux catégories doivent être mis sur un pied égal et recevoir le même taux de composition. Per Mackay, J.

16 mars 1871.

*In Re Morrison*, Insolvable, et *Dame Ann Simpson*, Réclamant, et *Henry Thomas*, Contestant.—Par son contrat de mariage, l'insolvable "did settle, give and grant to the said claimant, the sum of £1000 in such a wise that she should enjoy the interest and profits thereof, during the term of her natural life, should she survive her said husband, and at her death shall descend to and become the property of their children and in default of children, the heirs of the said James Morison." Jugé que sous la section 57 de l'Acte concernant la faillite, 1869, la maxime "jamais mari ne paya douaire," n'a pas d'application en cas de faillite du mari; que le douaire comme tous les gains et donations de survie sont des causes valables d'une réclamation conditionnelle ou éventuelle, et que partant dans l'espèce, la femme peut demander à être colloquée, au marc la livre, pour le montant auquel le syndic estimera la valeur de la donation conditionnelle ou éventuelle stipulée au contrat de mariage. Torrance, J.

18 mars 1871.

*Adam v. McCready*.—Jugé que l'acquéreur d'un immeuble qui a joui pendant dix ans à titre de propriétaire d'un immeuble grevé d'hypothèques par son vendeur, ne peut refuser le paiement d'aucune partie du prix de vente pour cause de crainte de trouble résultant de l'existence de ces hypothèques, la prescription les ayant éteintes quant à lui. Mackay, J.

30th March, 1871.

*Fraser & al. v. Abbott & al.*—By his last will and testament, executed before Griffin, Notary, on the 23rd day of April, 1870, the late Hugh Fraser did dispose of the largest portion of his fortune as follows:

"I give devise, and bequeath the whole of the rest and residue of my estate, real and personal, moveable and immoveable, of every nature and kind whatsoever, to the said Hon. J. J. C. Abbott, and to the said Hon. Frederick Torrance, hereby creating them my residuary fiduciary

legatees; and it is my will and desire that they do hold the same in trust for the following intents and purposes, namely: to establish at Montreal, in Canada, an institution to be called the 'Fraser Institute,' to be composed of a free public library, museum and gallery, to be open to all honest and respectable persons whomsoever, of every rank in life without distinction, without fee or reward of any kind."

Held, 1st. That the introduction of unlimited power of bequest into the law of Lower Canada (41 Geo. III) has not had the effect of abrogating the Declaration of December, 1743.

2nd. That the Declaration of 1743 has not been abrogated by the cession of Canada to Great Britain.

3rd. That the statute 41 Geo. III reproduced in articles 831 and 836 of the Civil Code forbids bequests to corporations which have not been granted permission to receive them.

4th. That in the Colonies the Royal Prerogative may be restricted in all that does not pertain to the fundamental principles and rights on which the sovereign authority rests, if formal laws exist in the colony restricting the Crown prerogative.

5th. That in substance (if not in form) the Declaration of 1743 is in conformity with the common law of England.

6th. That, although by the *Magna Charta*, it was forbidden to make gifts to religious communities directly or by trusts, this prohibition did not extend to the establishment of schools, nor to gifts made for the support of the poor, or for other charitable objects.

7th. Finally, that by the *ensemble* of the existing laws of Lower Canada, and more particularly under the provisions of Cons. Stat. of Canada, c. 71, c. 72, and article 869 of the Civil Code, the Declaration of 1743 does not apply to the "Fraser Institute."

The judgment is based upon the following grounds:

"Considering that the object of the aforesaid bequest, to wit, the establishment of a Public Library and Museum of Art, is legal, and does not require previous letters patent authorizing the same.

"Considering that under the said will the said Hon. J. J. C. Abbott and Frederick Torrance became and were vested with the estate so as aforesaid bequeathed to them for the purpose in the said will mentioned, and are authorized to construct the buildings necessary for the same.

"Considering that such bequest is valid under the provisions of article 869 of the Civil Code, and that the said residuary fiduciary legatees may hold the said estate and manage the same so as to carry out the desires of the said testator, until a corporation be regularly formed to administer the said Public Library, after the erection of the necessary buildings, and that until such time, no contestation as to the right of such corporation to take the legacy and bequest can take place; and that therefore the plaintiff's action cannot be maintained, doth dismiss the same with costs." Beaudry, J.



Montreal, 11 avril, 1871.

*Smith v. McShane.*—Jugé 1o. Qu'un bail est un *contrat* aux termes du statut 29-30 Vict. c. 56, s. 7 ; 2o. Que les contrats entre la cité de Montréal et un conseiller de ville, prohibés par cette loi, sont ceux qui sont consentis pendant qu'il est en office et non pas ceux, qui quoiqu'encore en force, ont été conclus avant son élection. Mackay, J.

#### COUR DE CIRCUIT.

Montréal, 28 février 1871.

*McLennan v. Martin.*—Jugé qu'il est nécessaire de signifier au débiteur copie de l'acte de signification, en même temps que la copie de l'acte de transport. Torrance, J.

Arthabaska, 7 octobre 1867.

*Rev. Messire Pierre Roy v. Joseph Bergeron.*—Jugé :

1o. Qu'une action pour dime est une action personnelle-réelle, et que la Cour des Commissaires est incompétente pour en connaître, aux termes du statut auquel elle doit son existence.

2o. Que le jugement d'une Cour de Commissaires qui prend connaissance d'une action pour dime est radicalement nul et n'a pas l'autorité de chose jugée.

3o. Que la dime est due sur les terres tenues en franc et commun socage, comme dans les autres parties du pays.

4o. Que les terres nouvellement défrichées ne sont pas exemptes de payer la dime pendant les cinq premières années du défrichement.

5o. Que le droit du curé à la dime n'est pas limité à la valeur de 500 francs, mais qu'il a droit de percevoir la dime de tous les grains décimables produits dans la paroisse.

6o. Que la dime, due avant le Code, s'arrérage et n'est pas sujette à la prescription annale. Polette, J. 2 Revue Légale, 532.

Nous devons à l'obligeance de M. Colston le résumé suivant des décisions récemment prononcées à Québec.

Quebec, 21st January, 1871.

*Caron v. Sylvain.*—Held : That a father, as such, has the right to utilize the services of his minor child, to hire him out and to sue for his wages. Taschereau, J.

*Poston & al. v. Watters.*—M, a member of the commercial firm P. and M., plaintiffs, being indebted to the defendant, sold to him goods, the property of the firm, with the condition that their price should be imputed in part payment of defendant's account against him. On action by the firm for the price of these goods, the defendant pleaded the agreement aforesaid and compensation.

Held : that a partner has no right to dispose of partnership property for his private benefit ; that the agreement pleaded was illegal and null. Judgment for plaintiffs. Taschereau, J.

*Blais v. Barbeau.*—Held: That a *commandement de payer* and notice that application for a *contrainte par corps* will be made in default of payment after the delay fixed by law, must be made and given, before a *contrainte par corps* for non-payment of amount of judgment can be granted. Taschereau, J.

*Tessier v. The Grand Trunk.*—Held: That the delivery to a policeman in the employ of the Co., at one of its stations, of baggage, several hours before the train started, and in the absence of the baggage man, is sufficient to bind the Co, when it is not shown that plaintiff had knowledge of the by-law of Co., that it would only be responsible for baggage when checked. Taschereau, J.

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#### SUPERIOR COURT.

Quebec, 18th February, 1871.

*St. Bridget's Asylum v. Fernay.*—In a petition for sequestration, the grounds on which such demand is based must be stated, and it is not sufficient to allege that it is in the interest of the petitioner that the properties be sequestered. Meredith, C. J.

*Lemay v. Lemay.*—In a petition to quash a *capias* or attachment before judgment, grounds of *exception à la forme*, v. g. irregularity of writ and endorsement, want of copy, &c., cannot be set up, and will be overruled on demurrer. Meredith, C. J.

*R v. Hamelin* (certiorari).—Conviction quashed, the mayor of a municipality having prosecuted in the name of such municipality, thus, "G. C. de la Ville de Lévis, maire de la dite Ville, au nom de la Corporation de la Ville de Lévis," and the offences stated in information and conviction being different. Meredith, C. J.

*Farrell v. Cassin.*—A defendant cannot under art. 1535, claim security equal to the value of the property, but where he has paid part of the principal of price of sale, he will be allowed to retain balance and such interest thereon as shall equal part already paid, unless plaintiff gives security for the entire price of sale, but without interest thereon. Meredith, C. J.

*Winn v. Pélissier.*—A shipmaster is only bound as to storage to follow rules and custom of port where he takes his cargo, unless there be an agreement to the contrary. Meredith, C. J.

14th February, 1871.

*B. C. A. Guy v. Wm. Brown.*—That the clause of the Interpretation Act requiring that whenever an article of the Code is to be repealed, the precise article referred to should and must be mentioned, is inoperative in the face of a statute substituting other provisions to those of the Code, though not specially referring thereto. Taschereau, J.

Montmagny, 13th February, 1871.

*Arsenault v. Rousseau & al.*—Held: That several defendants, though they have appeared separately but by the same attorney, may join in and file but one plea. Bossé, J.

Quebec, 2nd February, 1871.

*Batten v. Stone.*—It no longer suffices to give notice within four days and move on first day of ensuing term for security for costs. The application should be made within the four days. Meredith, C. J.

4th March, 1871.

*Huard v. Dunn.*—No action lies for false imprisonment under a conviction, valid on its face, so long as such conviction is in full force and vigor and has never been annulled or vacated. Stuart, J.

#### IN THE COURT OF REVIEW.

Quebec, 4th February, 1871.

*The National Bank v. The City Bank.*—Held, That the Code has not changed the law existing anterior thereto as to particulars in S. C. cases, and does not require that they be annexed to declaration or fully or in detail set forth therein. Stuart, Taschereau and Casault.

*Philippsthal v. Duval.*—On the 6th May, 1870, an order was made on defendants motion, fixing 9th for striking jury and 14th for trial. On 7th defendant demanded *acte* that he required jury list to be made up at least of one half jurors speaking English. On 9th the jury was not struck as defendant did not make the requisite deposit, he alleging objections to the composition of jury. Subsequently plaintiff moved to vacate order for jury trial; the defendant moved for a jury *de medietate linguae*; both applications were refused. On 18th June, an order was given on plaintiff's motion fixing 20th of June for striking jury and, 7th July for trial. The Prothonotary had prepared a list of forty-eight names for the striking ordered on the 9th May, between that date and 30th of June; when the jury was struck, a jury in another case had been struck. Defendant challenged the array on ground that a new list should have been made commencing with first name after the last on the last panel, *i. e.* that of the jury which had been struck between the 9th May and 30th June. Stuart, J., quashed the panel. Judgment reversed in review. Meredith, C. J., and Taschereau J. Stuart, J., dissenting.

#### IN THE COURT OF APPEALS.

Quebec, 18th March, 1871.

*McLaughlin & Regina.*—That no opposition lies to the execution of the judgment entered up by the Prothonotary under C. S. L. C. c. 106, s. 2 on a certificate from the Queen's Bench that a recognizance is forfeited, on the ground that the proceedings are irregular and the opposant should have been called upon to plead and defend before the Superior Court. Badgley & Drummond, dissenting.

*Gouin & Dubord*.—Held, That a *mandamus* will not lie against a Crown Lands Timber Agent to order him to issue licences for timber limits.

*Fraser & Patterson*.—The Insolvent has no action against the assignee to his Insolvent estate, even after his discharge, to compel him to render an account of his administration; his recourse is by petition or motion; and if he claims under deeds of composition and discharge, these must have been first deposited with the assignee to enable him to give notice of the same under the Insolvent Act.

*Gauthier & Sauvageau*.—Sénécal, to whose insolvent estate Sauvageau was assignee on 10th August, 1866, transferred to Gauthier certain sums of money owing to him, a year before he became insolvent and made an assignment, and the transfers above mentioned were only served on the debtors a few days prior thereto. On action by Gauthier against debtors, Sauvageau intervened, and Gauthier's action was dismissed in the Court below (Arthabaska). Judgment reversed by C. Q. B., who held:

That the creditors of the vendor are not, in the absence of fraud or simulation, *tiers*, in the sense of the art. 1571 C. C.

That the notification of the transfer under the circumstances was valid, and would have been valid even had the transfers been served "après la faillite notoirement connue et déclarée. Duval dissenting.

*Burton & Young & al.*—An action was instituted against Young & Knight for a penalty, which was dismissed. Appeal by the plaintiff Burton. The defendants, who had severed in the defence, severed on the appeal. Young died, and Knight forced on the case as against him, and judgment was confirmed. No proceedings were taken on the appeal for or against Young or his representatives. Motion by Knight to transmit record to the Superior Court granted: "Considering that more than six calendar months have elapsed since the appeal to Her Majesty, &c., was allowed, and that no certificate has been filed in this Court, as required by law, that such appeal has been lodged, and proceedings had thereon, &c."

18th March, 1871.

*Laventure & Dussault*.—Dussault sued the appellant for several hundred dollars. His action was dismissed in the Superior Court (Arthabaska), but this judgment was reversed in review, and the defendant condemned to pay \$250. In appeal, the defendant was condemned to pay \$87 and costs of action of that class, and the respondent condemned to pay the costs of appeal and review. Monk dissenting.

16th December, 1870.

*The Principal Sec. of State & McGreevy*.—McGreevy by his action claimed \$8597.50; the defendant pleaded tender of £644 7s, entire amount of indebtedness. Judgment in Superior Court for \$3019.18. On appeal by the defendant this amount was reduced to £679 7s. 6d., with costs of Superior Court, plaintiff (respondent) to pay costs in appeal.

LE SECRÉTAIRE DE LA RÉDACTION.

# REVUE CRITIQUE

DE

## *Législation et de Jurisprudence.*

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### ASSIMILATION OF THE STATUTORY LAWS OF THE PROVINCES OF ONTARIO, NEW BRUNSWICK AND NOVA SCOTIA.\*

The plan finally adopted has been to gather together the statutes in each Province, bearing upon any particular subject, omitting, as a general rule, those subjects on which the Dominion Parliament, under the Union Act, has an exclusive right to legislate, such as the Criminal Law, the Militia Law, Navigation and Shipping, &c., subjects on which uniformity could be secured without the action of the Local Legislatures, but, nevertheless, selecting even from those subjects, one, Bills of Exchange and Promissory Notes, as coming within the daily operations of the merchants and traders of the three Provinces, for the purpose of illustrating the differences in some of the most ordinary branches of business.

The next step was to make a summary of the provisions in each Province bearing on the subject selected, placing the same in

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\* The British North America Act, 1867, provides for the assimilation of the laws of Ontario, Nova Scotia, and New Brunswick, and in accordance with this provision, steps have been taken by the Dominion Government to ascertain the differences in the statutory laws of these Provinces, the common law (the English common law) being the same in all the three. The Hon. J. H. Gray was entrusted with this difficult and honorable task, and he has already made his preliminary report to the Honorable Minister of Justice, supported by voluminous Appendices, which have not yet been printed. Our article is an extract from the said report, prepared and contributed by the honorable and learned Commissioner.—[Ed. Note.]

parallel columns, giving as nearly as possible the corresponding sections of the Acts of each Province, with the substance of each section, for facility of reference, and in a general column of remarks at the close, pointing out the difference. In some instances where the mode of legislature was so entirely dissimilar, as hardly to admit of a selection of corresponding sections, then to give a concise review of the main parts of the mode adopted in each Province.

In carrying out this plan it was found that while both in Nova Scotia and Ontario, the statutes had been revised up to a much later period, and that in both an available index to their statutes to within the last four or five years could be found, yet in New Brunswick there had been no revision since 1854, and no general index for sixteen or seventeen years.

First.—It became, therefore, necessary to prepare such an index. This was done.

Secondly.—As there were many of the Imperial Statutes, which affected the Dominion—were frequently referred to in the courts—governed the administration of justice, and bore upon the property and civil rights of the three Provinces, of which statutes no collection had been made or existed in any compact form in any of the Provinces; it was thought advisable to make one, briefly referring to them by their titles and subject matter, when they were not of a character frequently to be cited; when they were, by giving the sections in full, as well as the title and subject matter; but omitting all parts of the statute not bearing upon British North America. This was done.

Thirdly.—Applications were made to the Provincial Secretaries of the Provinces of Nova Scotia and New Brunswick, and to the Secretary of State for the Dominion, to obtain, if possible, a sufficient number of copies of the codified and uncoded laws of the two former Provinces, and of old Canada—to be used for cutting out the extracts for the parallel columns—leaving simply the general remarks to be written, thus saving labour and time, and greatly facilitating the readiness with which the comparisons could be made.

From Nova Scotia no copy of the Consolidated Statutes was obtained, but one set of the Acts for five years, from 1864 to 1869 was sent.

From the Secretary of State for Canada, one copy of the Consolidated Statutes, and the Acts passed subsequently up to the time of Confederation.

From New Brunswick, nothing but the Acts passed since Confederation ; of the laws of the latter Province I had a perfect set of my own, which obviated the difficulty ; and of those of Nova Scotia, I obtained the use of the Revised Statutes belonging to the Secretary of State for the Provinces.

Fourthly.—The Statutory Laws of Ontario, irrespective of any made by the Dominion Parliament, are found in the Consolidated Statutes of Canada, up to 1859 ; the Statutes passed by the United Parliament of Canada, from 1859 to 1867 ; the Consolidated Statutes applicable to Upper Canada alone, passed by the United Parliament up to 1859, and similar Statutes passed by the same Parliament from that period to 1867, and the Statutes passed by the Legislature of Ontario since 1867, making an approximate total, in round numbers of 1,600 Acts or chapters ; but omitting those subjects that come exclusively within the scope of the Dominion Parliament, and have been legislated upon, and such Acts as were applicable to Quebec alone, about 1,100.

Fifthly.—The Statutory Laws of Nova Scotia will be found in one volume. The Revised Statutes, 3rd series, up to 1864, and in the Acts of the Local Legislature from that period, passed annually, comprising as above, about 700 Acts or chapters.

Sixthly.—In New Brunswick, the Statutory Law will be found in the 1st and 2nd volumes of the Revised Statutes up to 1854, and in the several Acts of the Local Legislature, annually passed since that period, comprising, excluding as above, and also those in the third volume, which are called private and local Acts, and which have not been at all referred to, about 1,200 Acts or chapters.

Seventhly.—Thus, in order to determine the Legislation on any particular point in Ontario, the search extends over a period of eleven years ; in Nova Scotia of six years, and in New Brunswick of sixteen years, and for the purpose of determining the entire uniformity or differences between them on matters coming within the jurisdiction of their Local Legislatures, an examination of upwards of 3,000 Acts.

Eighthly.—The laws of Nova Scotia, as found in the Revised Statutes, are the simplest, best arranged and most easily understood. Those in Ontario, from the past position and history of that Province, as a part of old Canada, and the general and separate special local legislation that was necessary, and the changes that have been made by its Legislature since Confederation, are

necessarily the most complicated and difficult to arrive at, assuming that information of the law on any subject is sought by one who, from previous knowledge, is not familiar with the legislation affecting that Province. In New Brunswick, the absence of any revision for sixteen years renders the search more intricate than in Nova Scotia, though less than in Ontario.

Ninthly.—The re-enactment in the Provinces of New Brunswick and Nova Scotia of many of the old English Statutes affecting the ordinary relations of life, such, for instance, as the Statute of Frauds, 29 Charles 2, chap. 3, and adaptation of others, with special alterations, suited to the local wants and habits of the country, such, for instance, as with reference to distresses for rent, the recovery of rents by an action for use and occupation, &c., make a knowledge of the remedies within their power, attainable by the people, and by the local magistrates who administer justice in the rural districts.

In Ontario—while as in the other two Provinces—those parts of the 9th Geo. 4, chap. 14, rendering a “written memorandum” necessary to the validity of certain promises and undertakings, which relate to taking a case out of the Statute of Limitations, the ratification of an infant’s promise after coming of age, representations as to the character and credit of a third party, being in writing, are specifically re-enacted; and a special reference is made to the Statutes of Frauds, for the purpose of extending the 17th Section, which relates to the sale of goods of the value of £10 and upwards; yet the provisions of the Statute of Frauds, with reference to promises for the debts or defaults of another, or in consideration of marriage, or on the sale of an interest in lands, or as to an agreement not to be performed within a year, &c., &c., do not appear to have been legislated upon, and the law in regard thereto must be sought for under the authority of chap. 9, of the Consolidated Statutes of Upper Canada, “An Act respecting property and civil rights,” which declares, “that in all matters of controversy relative to property and civil rights, resort shall be had to the Laws of England, as they stood on the 15th October 1792, as the rule of decision.” So also with reference to distresses for rent, or actions for use and occupation, &c., &c.

Tenthly.—In some cases the Legislation on particular subjects appears to be more limited in some Provinces than in others, probably from inadvertence, perhaps from the nature of trade. For instance, in Ontario, with reference to Bills of Exchange,



there is no provision whatever for the damages, interests, costs or protests on bills drawn on persons in Asia, Africa, Australia, New Zealand, Japan, Java, the Mauritius, Sandwich Islands, Cape of Good Hope; the East Indies with their great marts of trade, Bombay, Calcutta, Madras; or China, or Smyrna, or the other parts of the Eastern Mediterranean, or any places not coming under the designation of Europe, the West Indies, the United States, or other parts of America.

This omission, no doubt accidental, does not exist in the other two Provinces.

Eleventhly.—While New Brunswick and Nova Scotia long preceded Ontario in the adoption of that great legal reform which abolished the objection to witnesses on the ground of incapacity from crime or interest, and allowed parties to be witnesses in their own causes, leaving the question to be as to their credibility not their competency. (In New Brunswick as far back as 1856. In Ontario only in 1869). Yet, in several respects, the law in Ontario is in advance of New Brunswick, and in some degree of Nova Scotia, such, for instance as relates to imprisonment for debt, to recovery of landed property; to the discouragement of litigation by the difficulties thrown in the way of speculators in flaws in titles; by the powers that the courts and judges have of compelling a reference to arbitration in suits involving long and intricate accounts, the time occupied in the trial of which would operate as a denial of justice to other parties; by the clear and specific manner in which it disposes of the real estate of intestates, and others to which it is not necessary here to allude.

In many of these respects, the provisions of the law in Nova Scotia are equally excellent.

In New Brunswick, the law and its provisions relating to juries, both for its simplicity, its economy, and the finality resulting from the delivery of the verdict by a majority after due time for consideration,—the law relating to absconding debtors in dividing the estate fairly among the Creditors—instead of securing an absolute preference to the party who puts the process of the law in motion—and some of the provisions of the laws both in Nova Scotia and New Brunswick relating to partnerships, executors and trustees, to seamen, to wills, to the property of married women, &c., might judiciously be imported into the law of Ontario.

Twelfthly.—With reference to the Courts, while an Admiralty

jurisdiction and Court exist in each of the other Provinces, and under the extended powers given by a late act of the Imperial Parliament, 26 and 27 Vic., chap. 24, is influencing the administration of justice in a vast number of cases of constant occurrence in a trading and maritime community, which were almost without remedy before, and the benefit of which, under that Act, can be indefinitely extended to any of the Provinces,—Ontario with its vast lake trade is entirely without any such tribunal.

Thirteenthly.—In the Supreme Courts of the three Provinces, the jurisdiction is to the same extent; but in the Maritime Provinces, the Court of Chancery has been nominally amalgamated with the Courts of Common Law, and its existence as a distinct tribunal abolished. In New Brunswick its principles and mode of procedure remain as distinct as before the amalgamation with the Courts of Common Law, the change simply being that the Supreme Court has a Common Law side, and an Equity side. The same Judge may sit in Equity to-day and at Common Law to-morrow, and his decision at Common Law of to-day be restrained by his decision in Equity to-morrow.

He has no power, if in the progress of the cause at Common Law, it is found that the party would have a remedy or relief in Equity, to apply the remedy or give the relief, it must be sought for on the Equity side of the Court.

But though equitable defences in actions at Common Law are not provided for as in Ontario and Nova Scotia, yet, by Section 26 of the same Act, it is declared, "That whenever a demurrer will lie to a Bill for want of equity, the Judge on the argument may, if the facts warrant, instead of dismissing the Bill, order the remedy as at Common Law, or he may make such other order as to proceeding therein on the Common Law side of the Supreme Court, and for the trial of the same on such terms as to payments of costs or otherwise, as may appear to him just." —Sub. chap. 2, 2nd vol. Revd. Stats. page 83.

In Nova Scotia the fusion was more complete. By chap. 123, Revd. Stats. of Nova Scotia, 3rd series, it is enacted that the Supreme Court shall have, within the Province, the same powers as are exercised by the Courts of Queen's Bench, Common Pleas, Chancery and Exchequer in England. By chap. 124, "Of proceedings in Equity," it was enacted—Revd. Stat. 431, Sect. 1—that in that chapter the term "Supreme Court" should "include the Equity Judge and his Courts; the term "the Court," "means

"the Court of the Equity Judge, except otherwise expressed or clearly indicated; and jurisdiction expressed to be transferred to and to be exercised by the Supreme Court means the jurisdiction and powers of the Judge in Equity, alone, or with the associated Judges, and of the Judges of the Supreme Court on Circuit, and of the Supreme Court Bench on appeals."

"In the illness or absence of the Equity Judge, or in cases requiring attention in the country, the duties imposed on him shall be exercised by the other Judges, as the case may require.—Sect. 2.

"The Supreme Court has jurisdiction in all cases formerly cognizable by the Court of Chancery, and exercises the like powers and applies the same principles of equity as justice may require, and as has formerly been administered in that Court. In all cases in the Supreme Court in which matters of Law and Equity arise, the Court before which they come for consideration, trial, or hearing, shall have power to investigate and determine both the matters of Law and Equity, or either, as may be necessary for the complete adjudication and decision of the whole matter according to right and justice, and to order such proceedings as may be expedient and proper; and all writs issuable out of Chancery now issue out of the Supreme Court.—Sect. 3.

"The plaintiff may unite several causes of action in the same writ, whether they be such as have heretofore been denominated legal or equitable, or both. The causes of action so united must accrue in the same right, and affect all the parties to the action, and must not require different places of trial."—Sect. 7.

When applicable, the practice of the Supreme Court was to be observed, when not, the practice of the English Court of Chancery, and by Section 10, "In the final decision of cases on equity principles, the Court shall give judgment according as the very right of the cause and matter in Law shall appear to them, so as to afford a complete remedy 'upon equitable principles applicable' to the case. And in Sect. 43, it is declared lawful for the plaintiff in replevin or a defendant in any cause in the Supreme Court, in which, if judgment were obtained, he would be entitled to relief against such judgment, on equitable grounds, to plead the facts which would entitle him to such relief." And the plaintiff may reply an avoidance of those facts on equitable grounds. And in ejectment, an equitable defence may be set up.

Immediately following this Act (by chapter 125), provision was, notwithstanding, made for a distinct Equity Judge, who was to make rules to govern the practice in equity before him, and to hear and determine all matters of equity jurisdiction, and to preside in the Court when business required, and in the absence of the Judges of the Supreme Court from Halifax, to perform all the duties there that might be required of a Judge of the Supreme Court.

There was to be an appeal from his decisions to the Supreme Court, in which he was to sit as one of the Judges of Appeal. He was also to sit in Supreme Court in Banc., and at Chambers, but not to preside at trials or on circuit, except in case of illness of a Judge, or other sufficient cause.

In full Bench, in cases civil or criminal, legal or equitable, the Chief Justice was to preside; the Judge in Equity next to him, and, in case of the Chief Justice's absence, to preside.

Two years afterwards, in 1866, by 29 Vic., chap. 11, amending chapters 124 and 125, the above four sections, 1, 2, 3, 7, of chapter 124 were repealed, and the Equity Court and jurisdiction again re-established. Sec. 7 enacts, "That the 'Supreme Court,' 'and 'the Court,' and the 'Judges' or 'Judge,' in such chapter, 'except when herein otherwise expressed, or when inconsistent 'with the enactments hereof, are confined, in all cases of exclusive chancery jurisdiction, to the Court of the Equity Judge, 'or the Court or Judge occasionally exercising the equity jurisdiction; and in all cases of concurrent jurisdiction, those terms 'apply alike to such Court and Judge, and to the Supreme Court 'and its Judges; and in all cases purely at Common Law, contradistinguished from Chancery jurisdiction, those terms mean 'the Supreme Court and its Judges alone: and all suits or other 'proceedings for the redemption or the foreclosure of mortgages 'under the 24th section, and for specific performance under the '25th section; and in relation to real estates of infants, under 'the sections from the 51st to the 55th, both inclusive, of said 'chap. (124); and all proceedings, matters and things relating 'to the custody, care, and disposal of persons of unsound mind, 'and there estate and effects, under the sections from 2 to 9, both 'inclusive, of chap. 152 of the Revd. Statutes; and also, all 'proceedings under chap. 131 of the Revd. Statutes, third series, 'of 'trusts and trustees,' are under the equity jurisdiction only, 'and shall be prosecuted and conducted accordingly; and the

"terms, 'the Supreme Court,' and 'the Court,' and the 'Judges' used in the said sections and chapter, mean the Equity Judge, or the Equity Court, or the Court or Judge occasionally exercising the equity jurisdiction.

"But nothing in either of the said chapters 124 or 125, applies to or affects chapter 114 of the Revised Statutes, third series, 'Of the sale of lands under foreclosure of mortgages,' the proceedings under which may continue to be in the Supreme Court and before the Judges thereof.

"In case of the illness of the Equity Judge, or in case of his absence from Halifax, either within the Province on judicial duty, or for other cause, or abroad, and also in cases requiring attention in the country or circuit, and when the Equity Judge does not preside, the duties imposed on him may be exercised by the other Judges, or any of them as the cases may require."—Sect. 8.

"The Equity Judge has jurisdiction in all cases formerly cognizable by the Court of Chancery, and exercises the like powers, and applies the same principles of equity as justice may require, which were formerly administered in that Court."—Sect. 9.

Section 6 of chapter 124, which provided, that in the absence of the Judges of the Supreme Court from Halifax, the Equity Judge should perform all the duties of a Judge of the Supreme Court, was repealed; and in place of it, it was enacted in section 3 of said chapter 11, 29 Vic., that the Court of the Equity Judge should "be always open, and the other Judges of the Supreme Court or any of them, in cases where empowered, to exercise the functions of the Equity Judge, should have the full powers of the Court."

The right of the Supreme Court to admit of equitable defences, was still retained, section 10 says:—

Section 10. "But nevertheless in all actions at law in the Supreme Court, on the trial or argument of which matters of equitable jurisdiction arise, that Court has power to investigate and determine both the matters of law and of equity, or either, as as may be necessary for the complete adjudication and decision of the whole matter; and also, all actions at law, to which equitable defences shall be set up in virtue of the sections of this chapter, under the head 'Equitable Defences,' from sect. 43 to sect. 50, both inclusive, are, and shall continue to be tried, considered, and adjudicated by the Supreme Court and its Judges in the

"same manner as regards the said several cases respectively, as  
"the Supreme Court or the Judges thereof had power to do when  
"the Act for appointing a Judge in Equity was passed."

"But it shall be lawful for the Supreme Court, or any Judge  
"of that Court, before whom the consideration, trial, or hearing  
"of any question of equitable jurisdiction, or any such mixed  
"questions of law or equity may come, if they or he shall deem  
"it expedient and conducive to the ends of justice to do so, to  
"order the case, or any subject matter arising thereon, to be trans-  
"ferred to the jurisdiction of the equity Judge, to be dealt with  
"according to the principles of equitable jurisprudence, and the  
"exigencies of the case."

By an Act passed, chap. 2, 1870, "To improve the Administration of Justice," it is enacted that the Supreme Court should hereafter be composed of a Chief Justice, a Judge in Equity, and five other puisne Judges, and that the Judge in Equity should not be required to attend the Circuits, or sit in Banc. to hear arguments, except on appeals from the Equity Court, when he shall sit with the others; and further, that in case of his continued absence from the Supreme Court sitting in Banc., from illness or other cause, appeals from his decisions may be heard, and judgment pronounced as if he were present.

In Ontario the court and judges of common law and chancery, with their principles and practice remain as separate and distinct as they ever were, save that, as in Nova Scotia, there is a provision that a defendant or plaintiff in replevin, in any case may plead or reply the facts, that on equitable grounds would afford relief in equity against the judgment at law if obtained, subject to the opinion and action of the judge, whether the same can or cannot be dealt with by a court of law so as to do justice between the parties.

Thus, in the absence of any knowledge as to what construction may have been put or may yet be put upon the first part of Section 10, 29 Vic., chap. 11, Nova Scotia Act of 1866, it would seem that Nova Scotia in this respect has come back to where Upper Canada had remained, except as to the sale of lands under the foreclosure of mortgages, chap. 114, Revised Statutes 403, and it is thought, that in New Brunswick some material modification of the present system will at an early day have to be adopted, either by a more complete separation or by a more complete fusion of the courts of common law and equity.

The latter, if judiciously accomplished, would probaly be the most desirable, as those who are compelled to seek redress in litigation, expect to obtain, and ought to obtain justice full and complete, when it is admitted they are entitled to it, without being sent at great expense from law to equity, and from equity to law, to find it.

Fourteenthly.—In the Courts of limited jurisdiction the distinction is more nominal than real. Those in Ontario are the Country Courts and the Division Courts, the former having jurisdiction, subject to certain exceptions, over personal actions not exceeding \$200 unliquidated damages, and \$400 when the damages are liquidated, and by 23 Vic., chap. 43, in actions of ejectment where the annual value of the premises does not exceed \$200. The latter being sub-divisions of the country with certain exceptions to personal actions of \$40, and money demands of \$100.

In New Brunswick they are the Country Courts and the Magistrates' Courts; the former having jurisdiction, subject to certain exceptions similar to those in Ontario, in actions *ex contractu* to \$200, in *torts* to \$100, but no right to try ejectment; the latter, or Magistrates' Courts, in actions *ex contractu* to \$20, *torts* to \$8. The City Court of St. John has an exceptional jurisdiction of its own

In Nova Scotia there are no Country Courts, but the Magistrates' Courts have jurisdiction for the recovery of debts—one Justice when the dealings do not exceed \$20, two Justices when the whole does not exceed \$80. The jurisdiction being confined to the country where the debt was contracted, or the defendant resides.

In both Nova Scotia and New Brunswick there is a "Court of Divorce and Matrimonial Causes," with full powers to dissolve marriages *a vinculo matrimonii*, to declare the same null and void, and to hear and determine all causes, suits, controversies, matters and questions touching and concerning marriages.

In both Provinces the Court is a branch of the Supreme Court and presided over by one of its Judges, specially appointed for that purpose in New Brunswick by commission under the Great Seal of the Province, and in Nova Scotia, *ex officio* by the Judge in Equity for the time being, who is for that purpose termed "the Judge Ordinary." A difficulty has arisen in New Brunswick from the Act constituting this Court, making no provision

for the substitution or appointment of another Judge to act *pro hac vice* in case of the illness or absence of the Judge so appointed by commission, or his being prevented by other causes from presiding.

In Nova Scotia, the Act passed in 1866 with reference to this Court, provided that during the illness or temporary absence of the Judge Ordinary, the Governor in Council might appoint the Chief Justice or one of the Judges of the Supreme Court to act as Judge Ordinary, and by an Act passed in 1870, this last power was further extended to meet the case of his being prevented from presiding by any disqualifying cause. If this latter Act does not come within section 91 of the British North America Act, 1867, the difficulty in New Brunswick can be removed by local legislation. This difference, therefore, at present exists between those two Provinces on that subject. In both Provinces, powers are given to the Court to enforce its decrees, and in case of divorce on the ground of adultery, to determine whether the wife's right of dower, or the husband's tenancy by the courtesy shall be divested or not.

In New Brunswick the grounds of divorce, *a vinculo*, are limited to impotence, adultery, and consanguinity within the degrees prohibited by the 32 Henry VIII., touching marriages and pre-contracts.

In Nova Scotia they are extended to include cruelty and pre-contract.

In New Brunswick there is an express provision that the divorce *a vinculo* on the ground of adultery, shall not in any way affect the legitimacy of the issue. In Nova Scotia there is no such provision, perhaps not deemed necessary. In both Provinces provisions are made for appeal from the decision of the Judge to the Supreme Court, and in New Brunswick from the Supreme Court to the Privy Council in England.

In Ontario there is no statute constituting a Court of marriage and divorce.

In New Brunswick and Nova Scotia the Supreme Court being the sole Superior Court, there is no Court of appeal from its decisions, except to the Judicial Committee of the Privy Council in England, which, owing to the great expense attending any appellate proceedings therein, is practically of no avail to the great mass of the people in those two Provinces.

In Ontario a Court of Appeal is constituted, composed of the



Judges for the time being of its Superior Courts, of Queen's Bench, Chancery, and Common Pleas, with power to the Governor General to appoint any retired Judge of one of the said Courts to be the Chief Justice, or an additional Judge of the said Court of Error and Appeal.

Thus Ontario is the only one of the three Provinces which affords to the litigants therein, without resort to a distant and most expensive tribunal, the opportunity of an appeal to a Court composed of Judges other than those of the particular Court in which the complainant may justly conceive that he has been condemned or deprived of his rights contrary to law.

In Ontario the Senior Judge of the County Court is, *ex officio* Judge of the Surrogate Court.

In New Brunswick and Nova Scotia the Surrogate Judge of Probate is appointed directly to that office by the Governor in Council.

In Ontario, the Surrogate Court may order any question of fact, arising in any proceeding before it, to be tried by a Jury before the Judge of the Court, when such trial would take place in the County Court in the ordinary manner.

In New Brunswick and Nova Scotia, the Probate Courts have no such power.

Fifteenthly.—With reference to executors and administrators, an important provision exists both in Ontario and Nova Scotia relative to the law of evidence in suits arising out of matters with deceased parties in which issue has been joined, and a trial or any enquiry, is being had, namely, that it shall not be competent for the survivor or survivors, being a party or parties to the suit, or their wives, to give evidence on their own behalf, of any dealings, transactions, or agreements with the deceased, or of any statements or acknowledgments made, or words spoken by deceased, or any conversation with deceased; but such parties may be compelled to give evidence on behalf of deceased.

This apparently fair policy has not been adopted in New Brunswick, and is not in accordance with the law in England, perhaps because it is depriving one party, without any fault of his own, of an advantage which both possessed; and perhaps because the knowledge that such an advantage may be lost, induces parties more to reduce their agreements to writing, and thereby avoid unseemly conflicts of testimony.

In Nova Scotia, the proceedings against executors and admi-

nistrators *cum testamento annexo* have been simplified on behalf of legatees by permitting actions at Common Law, and in the same Act, for enabling executors appointed trustees by a will, or trustees appointed by deed, to be relieved of their trust or executorship by an application to the Supreme Court, or to be removed on an application in the same way by any one interested in the execution of the trust.

In the course of the work, Mr. Butler's Alphabetical Index of the Canadian Statutes, from 1859 to 1867, has been continued. So far as Ontario is concerned, from 1867 to the present day, and the New Brunswick index, first prepared and referred to above, has also been further continued to the present time.

There are many other differences which will be observed by an examination of the schedules annexed, but it is obvious that any review of a subject so comprehensive as the legislation of three Provinces must be more or less imperfect, unless made by persons familiar with the construction put upon the Statutes of each Province by the Courts of each Province. A knowledge of the decisions of the Courts in one Province alone might very erroneously lead a party to suppose that inadvertencies or omissions existed in the Statutory Laws of the other Provinces, which an acquaintance with the decisions of the Courts of those Provinces might show was not the case, but a knowledge of which could only be obtained by their being brought forward or quoted in the discussion on those differences themselves.

Opinions of the Statutes as found in the Statute Book, without knowing how far the practical operation of those Statutes may have been extended or narrowed by the critical examination to which they would be subjected in the process of judicial enquiry, must be subject to inaccuracies.

The instructions given to me being simply to prepare for a Commission hereafter to be issued—not to recommend or propose any form—I have confined my labor solely to pointing out the differences; but there can be no doubt that an excellent practical Code of Law, simple in its language, easily understood, expeditious and economical in its administration, could be formed from a judicious selection of the best of the Laws of each of the Provinces by men who were severally acquainted with each.

J. H. GRAY.

## LE DROIT CONSTITUTIONNEL DU CANADA.\*

(Suite et fin.)

## II.—QUELLES SONT LES AUTORITÉS COMPÉTENTES POUR DÉCIDER LES QUESTIONS CONSTITUTIONNELLES.

Nous avons déjà eu occasion d'indiquer cette autorité, en discutant la valeur des traités internationaux; il n'est peut être hors d'à propos d'insister plus longuement sur ce sujet important.

Il est évident qu'aucune législature ne peut être juge des questions constitutionnelles. Le jour, où la Législature d'Ottawa se permettra de décider de la validité d'une loi d'une législature locale, verra disparaître la liberté et l'indépendance des provinces confédérées.

On prétend que la décision des questions constitutionnelles appartient exclusivement à l'Exécutif des divers gouvernements supérieurs; on cite à l'appui de cette prétention les clauses 56 et 90 de l'Acte de l'Amérique Britannique du Nord, 1867. La clause 56 déclare que la *Reine en Conseil* pourra désavouer toute législation de la Puissance dans les deux années de sa transmission au Secrétaire d'Etat, à Londres; et "ce désaveu étant signifié par le Gouverneur Général, par discours ou messages à chacune des Chambres du Parlement, ou par proclamation, annulera l'acte à compter du jour de telle signification." La clause 90 contient une disposition analogue à propos des lois des législatures locales, avec cette différence que le désaveu doit-être fait durant l'année par le Gouverneur Général, au lieu de la Reine en Conseil, et qu'il doit-être publié par le Lieutenant Gouverneur de la Province.

Il n'entre pas dans le cadre d'une revue légale de discuter la valeur politique de cette vaste prérogative du droit de veto, qui s'est déjà fait cruellement sentir sur les chambres du Parlement

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\* Dans la première partie de notre travail, p. 202 nous affirmons "qu'aux Etats Unis, les traités n'obtiennent force de loi que par la sanction du Congrès." Nous avons omis de dire qu'il ne s'agissait que des traités qui disposent des fonds publics ou du territoire de la République. On sait en effet que la plupart des traités Américains sont ratifiés par le Président avec le consentement du Sénat.

du Canada dans le rejet de la loi fédérale réduisant le salaire du Gouverneur Général de \$50000 à \$35000. Ce qu'il nous faut rechercher, c'est son effet purement légal. On ne saurait soutenir qu'elle constitue l'autorité compétente pour décider de la constitutionnalité des lois. Il est évident que le droit de veto est non pas un droit judiciaire, mais un droit administratif, d'après lequel les lois pourront être désavouées, non pas seulement pour cause d'invalidité, mais pour des considérations d'ordre public ou politique; et de fait le désaveu du bill du salaire du Gouverneur Général nous offre un exemple pratique fort remarquable de la vérité de cette proposition.

L'on a sans doute observer qu'il ne suffit pas que le veto ait été apposé; il faut encore qu'il ait été signifié. Supposons que le Lieutenant-Gouverneur de la Province en refuse la signification à la Législature Locale, ou encore qu'une loi inconstitutionnelle ne soit pas désavouée; soutiendra-t-on que, si la loi ainsi désavouée ou non, est nulle constitutionnellement, les tribunaux devront l'appliquer tant que le veto ne sera pas parfait? Une telle prétention est trop absurde pour être soutenue. Il est évident que le pouvoir de juger les questions constitutionnelles doit nécessairement résider ailleurs que dans le conseil exécutif ou législatif. Les tribunaux, ces gardiens des lois de l'Empire et de celles de la Puissance et des Provinces, voilà l'autorité chargée exclusivement du soin de maintenir la Constitution. Mais quels tribunaux? Ceux de la Puissance ou ceux des Provinces?

La Puissance n'a pas encore de tribunaux propres. La création d'une Cour Suprême depuis si longtemps promise est encore attendue. Néanmoins ses attributions sont déterminées d'une manière tellement précise dans l'acte constitutionnel, qu'il est permis d'en parler. La section 101 de l'Acte de l'Amérique du Nord, 1867, déclare: "*Le Parlement du Canada pourra adopter des mesures à l'effet de créer, maintenir et organiser une cour générale d'appel pour le Canada, et établir des tribunaux additionnels pour la meilleure administration des lois du Canada.*" La Cour Suprême de la Puissance sera donc essentiellement une cour de juridiction d'appel pour toute l'étendue du Canada; et la juridiction de première instance, qui est donnée aux tribunaux additionnels, pour l'application des lois de la Puissance seulement, lui est par là même interdite. On ne peut rien trouver dans cette constitution de la Cour Suprême ou de ces tribunaux additionnels, apparemment semblables à la Cour

Suprême et aux Cours de Circuits des Etats Unis, qui limite l'examen des questions constitutionnelles à ces cours de justice.

Puisque la Cour Suprême sera uniquement une cour d'appel pour toute la Puissance, il faut nécessairement conclure qu'elle ne pourra avoir plus de pouvoirs que la cour dont il sera appel. Ainsi donc tous les tribunaux du pays sont chargés du soin de décider les conflits constitutionnels.

On objecte que les tribunaux sont les créatures du Gouvernement ou du Parlement ou des deux pouvoirs à la fois, et que ce serait renverser l'ordre public et politique que de les investir du droit de prononcer sur la validité des actes du corps législatif. Nous avons touché cette objection à propos des traités; mais il est important de nous y arrêter plus longuement. Les cours de justice ne sont certainement pas les serviteurs des autorités gouvernementales qui siègent soit à Ottawa, soit à Québec. La source première de leur juridiction se trouve non pas dans les actes du Parlement Colonial, mais dans les Statuts et les lois de l'Empire et, on pourrait ajouter, primitivement dans la personne du Souverain. Il n'est donc que trop juste que les tribunaux, au nom de l'Empire, au nom du Souverain, déclarent invalides des ordonnances passées contre leur volonté.

D'ailleurs c'est un principe du droit constitutionnel Anglais que l'interprétation comme l'application des lois appartient au pouvoir judiciaire. Suivant la fière expression de Chitty \* "the House of Lords in the interpretation of the laws is omnipotent; that is free from the control of any superior authority provided by the constitution." Toutes les juridictions judiciaires de l'Empire ont d'ailleurs cette suprématie, puisque la Chambre des Lords comme notre Cour du Banc de la Reine, ou le Conseil Privé, n'est qu'une cour d'appel.

Et en vertu de quel droit la Législature peut-elle invoquer qu'elle n'est pas responsable de ses actes au pouvoir judiciaire. N'est-il pas vrai que lorsqu'elle viole la Constitution, elle ne constitue plus un pouvoir législatif, mais purement et simplement un pouvoir usurpateur? La section 129 ne déclare-t-elle pas qu'elle ne peut changer les lois existantes qu'en se conformant à la Constitution, que "conformément à l'autorité du Parlement ou de cette législature en vertu du présent acte?" La loi n'est donc pas changée lorsque le législateur excède ses pouvoirs, et évidem-

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\* Chitty on Blackstone, vol. 1, p. 117.

ment, le juge qui maintient la loi et ignore l'acte de l'usurpateur remplit un devoir sacré. Et s'il arrivait que la magistrature abuserait de son autorité supérieure, ne peut-on pas encore ajouter que le remède est entre les mains de la Législature en forçant le juge de justifier devant elle de sa bonne conduite ?

D'ailleurs ce droit d'appréciation des actes des législatures coloniales ou inférieures n'est pas nouveau dans le droit public Anglais. Il a été maintes fois exercé par les tribunaux de l'Empire et des Colonies; et il suffit de référer aux autorités suivantes pour s'assurer qu'il y est incontestable. \*

La question a été récemment soulevée et discutée avec autant de talent que de science devant la Cour Suprême de Terre-Neuve, dans la célèbre cause de *Carter v. Le Mesurier*, décidée le 20 Mai 1870, et rapportée au 6me. volume du *Canada Law Journal*.

Les requérants pour bref de prohibition contre tous les membres d'un comité d'élection se plaignaient d'irrégularité et illégalité de leur part. Le Procureur-Général comparut pour eux et protesta contre l'intervention judiciaire dans ce qu'il considérait les procédés de l'Assemblée Législative.

"The Committee," disait-il, "being a part of the Assembly itself, and being appointed by that body for the purpose of conducting and determining an inquiry into the claims of certain parties to seats in the House, to prohibit it from proceeding in accordance with the orders of the House would be an illegal interference with the exclusive powers and privileges of the Assembly, for which no authority or precedent could be found."

Le Banc à l'unanimité lui répondit :—"Both Houses of the Assembly possess, as incident to their existence, all rights necessary for the due discharge of their legitimate functions, but the judgment of the Judicial Committee of the Privy Council, in a case which arose in Newfoundland thirty-two years ago, *Kielly v. Carson*, and has been affirmed by several other decisions in the same High Court of Appeal, has denied and forever set at rest the pretensions which once were raised by Colonial Legislatures, that, under the assumption that the "Law of Parliament" applied to them, their will was law, and

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\* *Kielly v. Carson*, 4 Moore, P. C. 63; *Fenton v. Hampton*, 11 id. 347; *Doyle v. Falconer*, L. R. 1 P. C. 328; *Re Brown*, 33 L. J. (N.S.) Q. B. 193; *Cuvillier v. Aylwin*, 2 Knapp, 72; *Bank of Australia v. Nias*, 16 Q. B. 733; *Craw v. Ramsay*, Vaugh, 292.

“ their proceedings were unexaminable by the Superior Courts. “ It is altogether visionary to imagine that any Legislative Assembly, body or person, possesses under British rule supremacy over the law in any particular whatsoever. Even the prototype of Colonial Legislatures does not claim for itself any such power, for in a recent work of no ordinary ability upon Parliamentary Government in England, I find the following passage : “ ‘ No mere resolution of either House, or joint resolution of both Houses, will suffice to dispense with the requirements of an Act of Parliament, even although it may relate to something which directly concerns but one Chamber of the Legislature : ’ “ Todd’s Parliamentary Government, 260.”

Enfin si la question était même tout-à-fait nouvelle parmi nous, il faudrait, la résoudre dans le même sens, sur la seule autorité de la jurisprudence des États Unis, établie sous un régime constitutionnel presque identique.

À une époque aussi reculée que 1803, à l’enfance même de la République, la Cour Suprême des États Unis proclamait ce principe comme d’ordre public et de l’essence même des institutions fédérales. “ If an act of the legislature,” disait-elle \* repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect ? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law ? This would be to overthrow in fact what was established in theory ; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

“ It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution ; if both the law and constitution apply to a particular case, so that the court must either decide the case conformably to the Law, disregarding the constitution ; or conformably to the constitution, disregarding the law ; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

“ If then the courts are to regard the constitution ; and the

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\* *Marbury v. Madison*, 1 Cranch 177.

constitution is superior to any ordinary act of the Legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

"Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

"This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breadth which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure."

En 1829 le principe fut encore affirmé par le même tribunal dans la cause de *Bank of Hamilton v. Dudley's Lessee*. \* Per Marshall C. J. :—"The judicial department of every government is the rightful expositor of its laws; and emphatically of its supreme law. If in a case depending before any court, a legislative act shall conflict with the Constitution, it is admitted that the court must exercise its judgment on both, and that the Constitution must control the act. The court must determine whether a repugnancy does or does not exist, and in making this determination, must construe both instruments. That its construction of the one is authority, while its construction of the other, is to be disregarded, is a proposition for which this Court can perceive no reason."

Le langage que tiennent les tribunaux des Etats est aussi précis. "The right" disait en 1815 le juge Martin pour la Cour Suprême de l'Etat de la Louisiane † "which courts of justice have to refuse their co-operation to the execution of unconstitutional laws is no longer a question. It results from the obligation contracted by the judges to support the Constitution, the fundamental and Supreme Law of the State, which no authority can shake."

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\* 2 Peters 524.

† *Johnson v. Duncan*, 1 Martin N.S. 654.



En 1826, le juge Porter pour la même cour disait. \* “ The counsel for the plaintiff on the argument of the cause, went at some length into the question, whether this court had the power to pronounce an act of the legislature unconstitutional. Were the question doubtful, the authorities he read might well be considered as settling it; but any reference to them, to support the position assumed was unnecessary in this court. It is a subject on which we never had a doubt, nor have any at this moment.”

### III.—DANS QUELS CAS UNE LOI PEUT-ELLE ÊTRE DÉCLARÉE INCONSTITUTIONNELLE ?

Aux termes de l'Acte de l'Amérique Britannique du Nord, 1867, il importe peu que le pouvoir de législater accordé à chacune des législatures ait été exercé ou non. Bien différente sous ce rapport des législatures des Etats de l'Union Américaine, leur juridiction respective est exclusive, et leur silence sur une matière de leur compétence ne justifie pas une législation émanant d'une autre source que celle indiquée par l'Acte Fédéral. Aux Etats-Unis, c'est un principe depuis longtemps établi que les Etats peuvent passer des lois de faillite en l'absence de telles lois de la part du Congrès; parce que la constitution américaine n'est pas exclusive sous ce rapport. Au Canada, au contraire, quand bien même l'Acte concernant la faillite 1869 serait abrogée, les législatures locales ne pourraient y suppléer en aucune manière pour leurs provinces respectives. C'est ce qui résulte évidemment des termes de la constitution. *L'autorité exclusive du Parlement du Canada ou des législatures locales s'étend etc.* † “ As the plan” dit un jurisconsulte d'une haute autorité en parlant du système fédéral des Etats-Unis ‡ *aimed only at a partial union or consolidation, the state governments would clearly retain all the rights of sovereignty, which they before had, and which were not, by that act, exclusively delegated to the United-States. This exclusive delegation, or rather this alienation of state sovereignty, would only exist in three cases: where the constitution in express terms granted an express authority to the Union. The last clause but one in the eight section of the first article, provi-*

\* *Le Breton v. Morgan*, 4 Martin N.S. 138.

† Voir sections 91 et 92 de l'Acte de l'Amérique du Nord, 1867, citées plus haut.

‡ Story, Com. on the Constitution of U. S. § 199.

des expressly, that congress shall exercise exclusive legislation over the district to be appropriated as the seat of government. This answers to the first case. Story ajoute: "The correctness of these rules of interpretation has never been controverted, and they have been often recognized by the Supreme Court."

Une règle d'une haute importance dans la décision des questions constitutionnelles veut que les tribunaux ne prononcent l'invalidité des lois que lorsqu'elle est claire et incontestable; et à cet égard la jurisprudence de nos voisins est encore notre guide.

*Brooks vs. Weyman*, \* by the Court: "We reserve to ourselves the authority to declare null any legislative act which shall be repugnant to the constitution; but it must be manifestly so, not susceptible of doubt."

*Johnson vs. Duncan*, † *Derbigny J.* "This Court has already had occasion to express their opinion in the case of the *Syndics of Edward Brooks vs. Weyman*; but they have also there expressed their sense of the circumspection with which such a right ought to be exercised. It is only in cases where the incompatibility of the law with the constitution is evident that courts will go to the length of declaring null an act which emanates from legislative authority."

*Nicholson vs. Thompson* ‡ *Martin J.* "The Judges of this Court have always considered themselves as the guardians of the constitutional rights of the people, and as such authorized to pronounce on the constitutionality of the acts of the two other departments of government; but we cannot say, that any act of theirs is unconstitutional unless it be manifestly so, and the question is not susceptible of doubt. *Syndics of Brooks v. Weyman*, 3 Mart. 12. In the case of *Johnson v. Duncan et al.*, *Syndics*, Id. 553. we held that it is only in case where the incompatibility of the Law with the constitution is evident, that courts will go the length of declaring null an act which emanates from legislative authority. In *Fletcher v. Peck*, 6 Cranch, 57. Chief Justice Marshall, says; "the question whether a law be void for its repugnancy to the constitution, is at all times, a question of much delicacy, which ought seldom if ever to be decided in the affirmative in a doubtful case."

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\* 1 Martin, N. S., 381 (1813.)      † 2 Martin N. S. 654 (1815).

‡ 5 Robinson, 404 (1843).

“ It is not on slight implication, and vague conjecture, that the  
 “ Legislature is to be pronounced to have transcended its powers,  
 “ and its acts to be considered as void. The opposition between  
 “ the constitution and the law, should be such, that the judge  
 “ feels a clear and strong conviction of their incompatibility with  
 “ each other”

*Hgde v. The Planters Bank of Mississipi*, 8 Rob. 422, Per Bullard, J; “ No adjudged case has been referred to in support of this position, and a very strong case must be made out to induce us to declare the Law of a neighbouring State unconstitutional, especially when it appears that the purpose of the law was in a great measure remedial. . . . But this court will not in any case of serious doubt as to the constitutionality of laws, pronounce them void especially when their operation is to protect our own citizens from injuries arising from the abuse of the banking power.”

*The State v. The Judge of the 5th Judicial District*, Per Eustis, C. J: “ To determine on the constitutionality of laws, the question whether the legislative branch of the Government has or not transcended its power, is the highest and most important act which the judiciary can be called upon to perform, and in the exercise of this responsible and delicate power, courts are bound to proceed with the greatest circumspection and deliberation. It has always been held that the presumption must always be in favour of the validity of laws, and that no law ought to be held unconstitutional, and consequently void and of no effect unless its opposition to the constitution be clear and free from doubt. It must be conceded that there is no article of the constitution with which this Statute is clearly or directly in conflict, and its repugnancy to the constitution is supported exclusively by implication. Without answering each argument of the respondent in detail, we think they will all be met by giving our views as to the judicial power as created by the constitution.

“ The judicial power shall be vested in a Supreme Court, in District Courts, and in Justice of the Peace, Art. 63. This certainly means that the whole judicial power, (the power of determining all cases without exception or reserve,) is vested in these three classes of magistracy, and in establishing this power to provide for the determination of every case of injury, the convention which framed the constitution acted on the elementary principle in the English Law, in reference to which our constitution in the

United States have all been made, that every right when withheld must have a remedy, and every wrong its proper redress."(\*)

IV.—DE LA CONSTITUTIONNALITÉ DE LA LOI CONCERNANT L'UNION ST. JACQUES DE MONTRÉAL ET DE QUELQUES DISPOSITIONS DE L'ACTE CONCERNANT LA FAILLITE, 1869.

Ce n'est pas notre intention de discuter la valeur des motifs de la décision de l'honorable juge Torrance dans la cause de *Bélisle vs. l'Union St. Jacques*, vu qu'elle a été portée en appel ; qu'il nous soit néanmoins permis d'observer que la principale question que présente cette espèce est de savoir si les mots, *banqueroute et faillite* de la constitution, *bankruptcy and insolvency*, comprennent également la déconfiture des particuliers non commerçants, dont les rapports appartiennent tout particulièrement au droit civil. Lorsque l'on considère que les matières sur lesquelles le Parlement de la Puissance a juridiction, sont toutes de droit public ou commercial, ne peut-on mettre en doute que ces mots *banqueroute et faillite* ne s'appliquent qu'aux commerçants ? Et si le doute est permis, ne doit-on pas maintenir la loi attaquée d'invalidité ?

Il existe encore plusieurs lois dont la validité peut raisonnablement être mise en question. Que penser en effet des clauses 10e et 12e de l'Acte concernant la faillite 1869, qui, en violation des lois formelles des Provinces, veulent que l'enregistrement d'un acte de cession, sans description des immeubles soit effectif ; des clauses 67, 77, 78 et 81 qui limitent si considérablement les privilèges du propriétaire et des employés ou commis ; de la clause 114 qui permet l'examen de la femme du mari devant le juge ; et enfin de la clause 140 qui exige, à peine de nullité, l'enregistrement des contrats de mariage des femmes des commerçants ? Toutes ces clauses ne consacrent-elles autant de dispositions contraires aux lois civiles de chaque province ? On ne saurait prétendre qu'elles forment essentiellement partie des lois de banqueroute, car il est facile de les détacher de l'acte de faillite, sans l'atteindre d'une manière importante. Et enfin, s'il était permis au Parlement Fédéral d'introduire toute espèce de législation, sous prétexte qu'elle est inhérente aux lois de banqueroute, tout

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(\*) 15 An. Louis, 758—voir aussi les autorités citées dans Fletcher v. Peck, (1810), 6 Cranch 87.

notre Code Civil serait à la merci de nos législateurs d'Ottawa. On a aboli en partie les privilèges qu'il accorde aux locateurs et aux serviteurs ; quelle garantie avons nous que demain on ne retranchera pas absolument des hypothèques et autres suretés du droit civil ? Il faut admettre que le pouvoir du législateur doit avoir des bornes, même lorsqu'il s'agit du règlement des faillites et banqueroutes. A notre humble avis, sa juridiction ne s'étend alors qu'aux matières qui appartiennent essentiellement à un système de faillite ; et elle cesse du moment qu'il a pourvu à la disposition de l'actif et à la décharge du failli.

D. GIROUARD.

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## INTRODUCTORY LECTURE TO THE STUDY OF THE LAW,

BY CHRISTIAN ROSELIUS, Esq.,

*Attorney and Counsellor at Law, Dean of the Law Faculty of the University  
of Louisiana.*

The science of jurisprudence, on the study of which it is our purpose to enter, is so vast and comprehensive in its range, and often, apparently, so contradictory and complicated in its details, that in order to avoid perplexity and confusion, we must, at the outset, take a survey of its general elements and prominent outlines. It is proper therefore, in this introductory lecture, that I should spread before you, as it were, a map of the extensive field we are about to explore. By pursuing this course we shall discover at the very threshold of our inquiries that law is not composed of a collection of heterogeneous and incongruous rules, dictated by the mere whim and caprice of the law-maker ; but that it is a beautiful and harmonious system, devised by the profoundest wisdom and foresight, to regulate the multifarious rights and obligations arising from the complex relations of social life, and founded substantially on the great and immutable principles of right and wrong, inscribed on the mind of man by the hand of his Creator.

Law, in the most enlarged sense of the word, is that power which exercises its dominion over everything, both in the physical and moral world. Hence law is divided into physical and moral law. The former is despotic and resistless in its sway ;—it

governs and controls everything in the material world, from the smallest particle of dust we tread upon, to the countless heavenly bodies that roll in illimitable space. The latter consists of rules of action for the guidance of man alone, as a moral, intellectual and accountable being. Although the precepts of the moral laws are obligatory and binding, yet man as a free agent, has the power of violating them, at his risk and peril. All nature is bound down to implicit obedience to irresistible laws, except man, who is left free to violate the special law given to him for the government of his moral conduct, because he acts under a fearful responsibility both here and hereafter. This moral or natural law is coeval with the human race, for history does not inform us of the existence of any people without it.

In the progress of society these original principles, or that primeval perception of right and wrong, were developed to meet the exigencies and wants of the people, and hence was gradually formed that regular system of laws, consisting of those rules of civil conduct, an observance of which can be enforced by the power of the State, and which is known by the appellation of the *Municipal or Civil Laws*.

But although the municipal law is, in the main, founded on and a mere development of the natural law, it must not be supposed that one is invariably conformable to the other. Motives of public policy, based on an infinite variety of considerations, frequently induce a people to adopt anomalous laws conflicting with those of nature.

Municipal Law is, in an enlarged sense, the expression of the whole public mind or conscience, either through the legislative department of the Government, or by the acquiescence of the people themselves, manifested by their acts and conduct. In the enactment of the written law the Legislature is the organ of the public mind; the unwritten or customary law is silently adopted by the people themselves. The law-making power is so inherent in the people that it never can be entirely wrested from them even by the most unmitigated despotism; for although the despot may, to a great extent, pervert and misrepresent the public mind, he cannot completely silence it. The history of every nation is replete with evidence of this important fact. When, for instance, under the regal government of Rome, arbitrary and oppressive laws, were enacted, repugnant to the public sentiment, the kingly power was subverted, and the Tarquins had to fly for their lives!

When, at a subsequent period, the patricians oppressed their fellow-citizens by unequal and tyrannical laws, the plebeians rose upon their oppressors; resumed the legislative power; abolished those odious distinctions which the usurpation of the aristocracy had introduced into the laws; and adopted that series of profoundly wise *plebiscita*, which still challenge our admiration! Even in her decrepitude and decay, when Rome was ruled with an iron rod, by the worst monsters that ever disgraced humanity, the public mind found an organ in the writings of those great lawyers, whose opinions obtained the force of laws and who built up and perfected that admirable system of jurisprudence which, by the common consent of mankind, has been honored by the appellation of written reason. Papinian was the contemporary of Caracalla, and was assassinated by that wretch, whose hands were still reeking with the blood of his brother, Geta, for refusing to write an apology for fratricide. The public mind of France was energetically, though silently, expressed in its customary laws, during the worst and most absolute tyranny of its kings. An attempt to stifle the expression of the public mind in its laws, brought Charles the First to the block. The same effort on the part of the narrow-minded and obstinate George III, lost him the brightest jewel in his crown. Within our own recollection, we have witnessed two crowned heads driven into exile by the same cause, Charles X, and Louis Philippe of France. These examples might be multiplied to an almost indefinite extent; but a sufficient number has been cited to fortify my position. Hence it is obvious that no individual, or set of individuals, can be permitted to oppose their conscientious scruples to the binding force and effect of a law, without a total subversion of the whole social fabric.

Municipal or Civil Law, in its technical sense, is a rule of civil conduct, prescribed by the law-making power, an observance of which can be compelled, and its violation punished, through the judiciary department of the government. The word *Civil* is here used in contradistinction to moral conduct: all *Civil* conduct is productive of legal rights and obligations.

All the serious concerns of life resolve themselves into rights, duties and obligations. It is the province of the law to define and protect legal rights, and to enforce the performance of legal obligations. The terms legal rights and obligations, are used in contradistinction to that class of imperfect rights and duties

defined and inculcated by the precepts of morality and religion, but of which jurisprudence takes no notice. To illustrate,—when I insure your property, I incur the obligation to pay the damages which I have caused, and you acquire the right of invoking the aid of the law to compel me to indemnify you; this is an example of a legal or perfect obligation and corresponding right. On the other hand I am under the moral obligation to be grateful to my benefactor; but if I neglect the discharge of that duty, the law cannot coerce me to perform it; and, therefore, the obligation is an imperfect one.

A legal right is the faculty or power of acting with regard to its object in conformity to law: *jus est facultas agendi*. I have a legal right to my watch; that is I have the power to do what I think proper with the watch; I may sell it; I may give it away; or I may even destroy it; but in the exercise of this faculty, I am not permitted to violate any law or rule of morality.

Legal rights are either personal or general: they are called personal when they have their origin in a corresponding legal obligation, incurred by a particular person, or a designated number of persons; they are general, when they exist independently of any personal obligation, and equally against the whole world. Thus, when I borrow a thousand dollars of you, your right to the return of the money arises out of the obligation which I have contracted in borrowing the money; consequently it is a personal right to be exercised against me alone. But if I am the owner of a house, you are bound to respect my right of property, and to refrain from doing any act that would be an infringement of my right of property, but this duty or obligation is not limited to you—it is equally binding on all other persons, my right is therefore general—*erga omnes*.

There are four essential elements in every legal right.

*Firstly*.—A person to whom the right belongs, or who is its active subject.

*Secondly*.—A thing which forms the *object* of the right, or with reference to which it exists.

*Thirdly*.—A fact or event which is the source or origin of the right, or by the happening or occurrence of which the right is created, and

*Fourthly*.—A judicial action to protect and enforce the right, and to make it efficacious and perfect.

The law regarded persons only with reference to their capabi-



lity of acquiring legal rights, and of incurring perfect obligations; if, therefore, a human being should be destitute of this capacity, he would not be considered as a legal person. Hence every natural individual is not necessarily a person, for without the capacity of acquiring rights and of incurring obligations, there is no legal person. This definition of what constitutes a legal person, of course applies only to the civil law terminology, for in the eye of the criminal law, every human being is viewed as a person without any regard to the capacity of acquiring rights or incurring obligations.

Persons are either natural, or merely juridical or fictitious; juridical persons are created by the law, they are legal abstractions, to which the law communicates the capacity of acquiring rights and of incurring obligations to this class of persons; belong all private corporations, such as banking institutions, insurance companies, as well as *hereditas jacens*, and many others.

Natural persons are subdivided into those who are in the untrammelled exercise of all their legal rights without the intervention of any other person or authority; and those who, on account of age, infirmity or body or mind, of in consequence of the relation in which they stand towards another person, are not permitted to exercise their legal rights without the co-operation, and in some cases exclusively through the agency, of another person. The latter class embraces minors, married women, and those who have been interdicted.

After having formed a general idea of persons, we must next direct our attention to the consideration of *things*, as the second essential element of rights. The law generally treats of things only so far as they are the object of legal rights, or as we observed before, a person is the *subject*, and a thing the *object* of every legal right.

In the same manner as persons are characterised by their capacity to have or acquire rights, to the term things comprehends whatever is susceptible of forming the object of a right. Here again the law exercises its power of abstraction, and creates things that have no existence in the physical world, things that are neither visible nor tangible.

In this last category of things, are included all obligations by which property is not directly and immediately transferred from one person to another. These things are called incorporeal: hence the great division of things into corporeal and incorporeal.

Whatever can be used to satisfy the wants, or conduce to the convenience or pleasure of man, is susceptible of forming the object of legal rights.

We have thus glanced at the *subject* and the *object* of legal rights; and this brings us to the inquiry how they are formed. It is evidently not sufficient that there should be a person with capability of becoming the *subject*, and a thing to be the *object* of a legal right, in order to create or give existence to that right: something else is requisite to call it into being; and that is the happening of some fact or event, which is the immediate or proximate cause of its creation or formation. Thus rights are acquired by contracts, quasi-contracts; offences, quasi-offences; inheritance, &c.

These are all facts, acts or events, without the occurrence or happening of some one of which no legal right can have any existence. It is therefore evident that there can be no question of law unconnected with a certain state of facts. When we say that a case presents nothing but a question of law, we only assume that the facts on which the law is to operate are admitted, or not disputed; for otherwise the assertion would involve a contradiction in terms. It is absolutely impossible that any practical question of law can arise without a particular state of facts.

This distinction between questions of fact and questions of law seems to be plain enough, and no lawyer who has studied his profession as a science, and whose knowledge of law is not exclusively empirical, can ever experience any difficulty in perceiving the obvious line of demarcation which divides them. Yet the Supreme Court of this State, in the case of *Cammayer*, decided in the May term of 1853, confounded a clear, unmixed question of law with a supposed question of fact. The case was briefly this;—*Cammayer* was prosecuted for the crime of larceny; after the evidence of the prosecution was closed, his counsel requested the District Court to charge the jury, that the facts proved, did not, in law, constitute the offence charged, *i. e.* larceny. This charge the judge refused to give, and a bill of exceptions was taken to the refusal, in which all the facts proved were incorporated, and certified by the District Judge. On the trial of the appeal, the only question to be decided by the Appellate Tribunal was, whether the state of facts set forth in the bill of exceptions, constituted the crime of larceny? That this was a dry, naked question of law, unmixed with any question of fact, would seem to be too evident to admit of controversy.

Nevertheless, the Court determined the contrary, and observed —“ the jurisdiction of this Court extends to criminal cases on questions of law alone and if we were to examine the facts on which the jury found the verdict, in order to determine whether the Court below erred in refusing to charge them that those facts did not constitute larceny, we would certainly be exceeding our jurisdiction, and deciding on the facts as well as the law.” That so glaring an error should have been committed by that high and enlightened tribunal is passing strange; that it should have been pertinaciously persisted in, when pointed out, is to be deplored.

But the concurrence of these three elements of rights (person, thing, fact), would frequently be of little avail if there were no means of effectually protecting and enforcing rights; this fourth and last element, which gives force and efficacy to the others, is called *action*. Legal action in its enlarged sense, means the exercise of the power of government through the judiciary for the vindication of rights and the enforcement of obligations. The definition of actions of the Roman Law has been copied almost literally into our Code—“ *actio autem nihil aliud est, quam jus perseguendi in judicio, quod tibi debetur.*” An action is the right given to every person to claim judicially what is due or belongs to him.

The history of actions, their various forms and ceremonies, in the gradual growth and development of the Roman jurisprudence, is one of the most curious and interesting subjects of inquiry. We shall have occasion to discuss this important matter in the progress of our labours; for it must be our constant endeavour to unite the theory with the practice of the law.

All rights may be classed under one of four divisions:

*First.*—Family rights.

*Secondly.*—Rights in and to things, or real rights.

*Thirdly.*—Rights arising from obligations; and

*Fourthly.*—Succession rights.

In the first division are included all those rights arising from the domestic relations, such as husband and wife, parent and child, master and servant, &c., &c.

The second comprises titles and claims of every description to things, whether moveable or immoveable.

Every obligation necessarily produces a co-relative right; hence the relation between debtor and creditor.

This class of rights constitutes the third division.

The last category of rights embraces those which have their origin in inheritance, either legal or testamentary.

Three of the elements of rights which have been thus faintly and imperfectly sketched, are developed and expounded in the Civil Code, and the last is treated of in the Code of Practice.

The Civil Code is divided into three books; each of which is devoted to one of these elements. The first, treats of persons; the second, of things and of the different modifications of the various rights that may be acquired in things; and the third, of the different modes of acquiring the property of things, or as we have stated, of facts, acts or events, by which rights are created.

Such is the simple and logical arrangement of the great heads of jurisprudence, adopted in the Code of Louisiana, which is the repository of the modern Civil Law, as contradistinguished from the Common Law which prevails in England, and in the other States of the Union.

A sort of rivalry seems to be carried on between ignorance, prejudice, and arrogance, for the purpose of depreciating the merits of the Civil Law. Indeed, most of those critics, while indulging in their unbounded and extravagant admiration of the Common Law, at the expense of the Civil Law, dogmatically deny that the latter has any merit at all. Lord Mansfield, whose great legal mind and splendid judicial labours contributed so largely to give something like shape and symmetry to the uncouth and rude materials of the Common Law, was vilified and abused by Junius, for resorting for instruction, to that pure fountain of legal science—the Roman Civil Law. Among other charges which he urges against him, he says.

“ I see through your whole life, one uniform plan to enlarge the power of the crown, at the expense of the liberty of the subject. To this object, your thoughts, words and actions, have been constantly directed. In contempt or ignorance of the Common Law of England, you have made it your study to introduce into the Court, where you preside, maxims of jurisprudence unknown to Englishmen. The Roman Code, the law of nations, and the opinions of foreign civilians, are your perpetual theme; but whoever heard you mention *Magna Charta* or the Bill of Rights with approbation or respect? By such treacherous arts the noble simplicity and free spirit of our Saxon Laws were first corrupted. The Norman conquest was not complete until Norman lawyers had introduced their laws, and reduced slavery to a system. This

one leading principle directs your interpretation of the law, and accounts for your treatment of juries, etc."

The attractive and classic style of Junius has given currency to this groundless aspersion; but instead of being confined to the individual against whom it was directed, it has become fashionable to apply it to the Civil Law itself. Now Junius, with all his varied attainments, was either profoundly ignorant of the Roman Private Civil Law, or he was guilty of wilful misrepresentation.

Those who object to the Civil Law on the ground of its repugnancy to the principles of liberty, are evidently unacquainted both with its letter and spirit: the public or constitutional law of the Roman Empire, and the *Senatus-Consulta*, as well as the imperial rescripts in relation to the organization and administration of the Government, have never been in force in Louisiana, nor in any other country since the destruction of the imperial government: what has been preserved and handed down to our time, is the *private law*; and I should like to be informed in what respects that part of the Roman jurisprudence is hostile to the spirit of liberty. The admirers of the Common Law, are justly proud of that feature in it which secures the trial by jury; but some of them do not seem to know the fact, that the trial by jury formed a constituent part of the Roman Law, three centuries before Julius Cæsar conquered England; and at least six centuries before the Common Law had any existence.

The term *Judices* designates in general, says Bonjean, in his *Treatise of Actions*, vol. i, p. 164, § 72, the jurors to whom the Roman Magistrates referred the cognizance and consideration of cases, and to whom was delegated the power to decide them.

During the period of the Republic, these juries were known by the names of *judex-unus*, *arbiter*, *recuperatores*, *centumviri*, as the modern expression judge conveys the idea of a public functionary, we shall without hesitation use the word *jury*: there exists, besides, a striking analogy between the *judices* and our juries, for Cicero himself designates them by the appellation of *judices jurati*. *De Lege Agraria*. In the Common Law they are called *juratores*, an expression of doubtful Latinity.

As our juries, the Roman *judices* were simple citizens, called upon to decide cases submitted to them; their functions were essentially temporary, and limited to the case in which they were empanelled and sworn; when the suit was decided, they disap-

peared, and were lost in the crowd of their fellow-citizens. They generally only decided questions of fact, though in some instances they were authorised to judge of the law as well as of the facts. The Praetor, or other magistrate, laid down the rules of law applicable to the case, and directed the *judices* or jury to condemn or absolve the defendant in accordance to the state of facts which they might ascertain to exist. Our judges charge the jury as to the law, after the evidence has been closed and the argument heard; the Roman Praetor informed them of the law, before the inquiry into the facts was commenced. With us the judge presides at the trial of the case, decides incidental questions of evidence, etc., but is not present at their deliberations, nor has he even a casting vote in the rendition of the verdict; under the Roman law, after the judge had stated the law to the jury in writing, he did not participate any further in the trial of the case, but left its discussion entirely to them. *Gaius* iv: 46, 104, 105, 109, 141. Now, let me ask, what is the substantial difference between the trial by jury according to the Roman law, and that of the common law? Is it the cabalistic number twelve? But how do we know what was the precise number of the *recuperatores* or of the *centumviri*, empannelled and sworn in each case? We know that the *judex unus*, and the *arbiter*, acted generally alone, though the twelve tables speak of *tres arbitri*; but we have no reliable information of the number of *recuperatores* or *centumviri* who acted in each suit.

Another of the boasted excellencies of the common law is the *habeas corpus*, which was recognised by statute in the reign of Charles the Second; but this invaluable protection for the personal liberty of the citizen is derived from the civil law, and was familiar to the Romans, more than two thousand years before its permanent introduction into England, by the name of *Interdictum de libero homine exhibendo*, which was a laconic and stern command addressed by the judge to any individual who detained a freeman, to produce him instantly, *Quem libero dolo malo retines, exhibeas*. This writ was granted forthwith on the application of any person. D. 43, 29, 1 et seq.

No doubt the few fragments of the twelve tables that have come down to us, are stamped with the harsh features of their aristocratic origin. But the *jus honorarium*, established by the Praetors and other magistrates, as well as the Customary Law, which was built up principally by the writings and opinions of

the *prudentes*, are founded essentially on natural equity and justice, and breathe the most liberal spirit of equal rights in every line.

The Roman jurists always assume that the law-making power belongs to the people: the Emperors attempted to justify its exercise on the ridiculous pretext, that the people had voluntarily surrendered the legislative power, and vested it in them by the *lex regia*, by which they pretended the *imperium* was conferred on them. But this is a contemptible fiction invented by the flatterers of power.

It is an historical fact, that the Civil Law prevailed in England, and was publicly taught in her Universities, for more than three centuries. Nay, all the leading principles of the Common Law, except those relative to the titles and rights of real estate, can be traced to the Roman Law. The complex and artificial rules concerning titles and conveyances of immoveable property, had their origin and foundation in the feudal system, which has never been considered as distinguished for its tendency to promote or encourage the spirit of liberty.

But why was the Civil Law superseded in England? Why were its professors silenced in the University of Paris? Why was its quotation prohibited under the penalty of death in Spain? Surely not because its principles were repugnant to liberty; for when these events took place, England, France and Spain, were equally groaning under oppression and despotism.

Comparatively, anatomy is one of the most important branches of study to the physician; and I have often thought that the study of comparative jurisprudence would be of equal usefulness to the lawyer and the legislator. It seems to me that every Law School should have a chair to teach this special branch of legal learning.

Far be it from me, however, to say a single word in disparagement of the Common Law. It is, in the eloquent language of Judge Story, the law of liberty, and the watchful and inflexible guardian of private property and public rights. In a practicable point of view it is almost as necessary for a Louisiana lawyer to be acquainted with the doctrines of the Common Law as to be familiar with those of the Civil Code. Questions depending for their solution on the former arise daily in our tribunals, and the practitioner who is a mere *civilian*, is only half qualified for the efficient exercise of his profession. Eclecticism has been adopted

in many of the other departments of the moral sciences; why should the student of jurisprudence not avail himself of its advantages? Why should we not profit by the illustrious example of a Story, a Kent, a Mansfield, and a host of others? It is time that the narrow-minded and petty bickerings about the superiority of one system over the other should cease; sectarianism can find no permanent place in the science of jurisprudence.

It would be a great mistake to suppose that a knowledge of the Civil Law can be acquired by the study of the Louisiana Civil Code alone. Let us, therefore, direct our attention for a moment to the consideration of the best sources of information to assist us in our proposed course of study. When Louisiana was colonized by the French, in the early part of the eighteenth century, the custom of Paris was introduced as the Private Law of the colonists. At that period the northern part of the Kingdom of France was governed by a great variety of customs, none of which had been reduced to writing before the year 1510, during the reign of Louis XII. In the south of France the written law (*droit écrit*,) or Roman Law prevailed. But even in those provinces of the Kingdom, governed by customs, the Roman jurisprudence was resorted to as a subsidiary system to afford rules for the decision of cases not provided for by the customary law. About 1769, after the cession of the province of Louisiana by France to Spain, the Spanish Law was introduced by the celebrated Don Alexander O'Reilly. That system of laws is substantially identical in its leading general principles with the Roman Law as found in the compilations of Justinian. The Spanish Law was collected shortly after the dawn of the revival of learning into a number of Codes of different degrees of merit. By far the most perfect and complete of these Codes is that compiled under the auspices of Alphonso el Sabio, the learned, known as the *Siete Partidas*, published in 1263, but which was not authoritatively promulgated as the law of the land until 1348, in the reign of Alphonso XI.

Alphonso the Wise succeeded his father Ferdinand III, on the throne of Leon, and Castille, in the year 1252. He was entangled in a contest with Rodolphe of Hapsburg, for the German Empire, in which enterprise he failed. But during his competition for the imperial crown, and consequent absence from his Kingdom, the Moors invaded his territories, and to add to his misfortunes, he was dethroned by his own son Sanchez. He died broken-hearted at Seville, in 1282.



Mr. Schmidt, in his excellent, *Historical Outlines of the Laws of Spain*, justly observes, that "this Code is one of the most remarkable monuments of legislation of the middle ages, and which the Spaniards regard with the highest veneration, and as a model both of style, method and precept." It still continues to govern Spain, Mexico, and the whole of South America. But it cannot be denied that Alphonso borrowed nearly all that is really valuable at the present day in his collection, from the Roman Law. Many of its provisions bear the distinct impress of the age in which they were written, and refer to matters which are entirely foreign to a Code of Laws.

Although the Roman Law, as has been observed, was the original source whence nearly all the really and permanently important portions of the Spanish Law was extracted, yet instead of gratefully acknowledging their obligation, it has been asserted by some writers, that the Spanish law-makers had the egregious folly to prohibit their judges and lawyers, on pain of death, to quote or refer as authority to the fountain of their legislation. I have not been able to find, in the law containing the prohibition, the dreadful penalty for its violation. But be this as it may, the absurdity of the prohibition defeated the object which it was intended to accomplish, for the fear of death itself could not deter the Spanish Jurists from availing themselves of the accumulated wisdom of ages. Every effort to quench by force or fear the intellectual light which the human mind has once made its own, has been alike unsuccessful. When Galileo was released from the dungeons of the Inquisition because he had retracted his alleged heresy, he whispered to his friends who met him at the prison door, "*But the earth turns notwithstanding.*"

To the general student, the *Siete Partidas* are highly interesting, as evincing the early development and perfection of the Spanish language. The ordinary Spanish scholar experiences no difficulty in understanding the phraseology and diction of Alphonso the Wise, written in the middle of the thirteenth century. Few persons indeed can boast of being able to read with facility the English, French or Italian authors of the same period.

In 1808, a meagre and incomplete digest of the existing laws was published by the territorial government of Louisiana, which is known by the name of the Code of 1808, or the "Old Code." Notwithstanding this work, however, the Spanish Law continued in full force, in every particular, not differently provided for by

positive legislative enactments. For the purpose of enabling the citizens generally to acquire a knowledge of these laws, the legislature passed an act on the 3rd March, 1819. authorizing the printing and publication, at the expense of the State, of an English translation of that portion of *Los Siete Partidas* which was considered as having still the force of Law in Louisiana. This translation was executed by Louis Moreau Lislet and Henry Carleton, both gentlemen of the New Orleans Bar, of respectable legal attainments; it was published in 1820, and is known as "Moreau and Carleton's Partidas." Though on the whole a tolerably faithful translation, it is not safe to place implicit confidence in its version, without comparing it with the original.

On the 14th of March, 1822, the Legislature passed a resolution, appointing three distinguished lawyers, namely—Edward Livingston, Louis Moreau Lislet, and Peter Derbigny, to suggest and propose additions and amendments to the Code of 1808, and report the same to the General Assembly. The jurists thus appointed presented the result of their labour in the incredible short period of one year; for their report was printed in 1823; the Legislature displayed equal zeal and diligence, in the discussion and adoption of nearly all the additions and amendments as proposed, during the Session of 1824. On the 12th April of that year, an act was passed to "provide for the printing and promulgation of the amendments made to the Civil Code of the State of Louisiana." It became the law of the State on the 20th June, 1825.

This extraordinary precipitancy, is, no doubt, the cause of many serious defects which are to be found in the work. One of the most serious of these defects is the imperfect and frequently incorrect translation into English of those articles which have been copied from the Napoleon Code; indeed the whole English text of the Code ought to be rewritten.

The Louisiana Code has, in a great measure, been transcribed from the Civil Code of France; it contains, however, many of the peculiar features of the Spanish Law. By the 3521st article of this Code, it is provided that—

"From and after the promulgation of this Code, the Spanish, Roman and French Laws, which were in force in this State, when Louisiana was ceded to the United States, and the acts of the Legislative Council, of the Legislature of the territory of Orleans, and of the Legislature of the State of Louisiana, be and are

hereby repealed in every case, for which it has been specially provided in this Code, and that they shall not be invoked as laws, even under the pretence that their provisions are not contrary or repugnant to those of this Code."

So that the Roman, Spanish and French laws still remained in force, as to all cases not specially provided for in the Louisiana Code. But in 1828 the Legislature passed an act expressly repealing those laws. It provides, that all the Civil Laws which were in force before the promulgation of the Civil Code, lately promulgated, be and are hereby abrogated, except so much of title tenth of the old Civil Code as is embraced in its third chapter, which treats of the dissolution of communities or corporations. Session Acts of 1828, p. 160.

Notwithstanding the general and sweeping character of this repealing act, the Supreme Court decided in the cases of *Reynolds vs. Swain et al.*, 13 L. R. 198; *Waters vs. Petrovic* and *Blanchard*, 19 L. R. 591; that for the purpose of expounding legal principles and developing the doctrines of jurisprudence, the writings of the Roman and Spanish jurists might be consulted as safe guides, and their authority was entitled to respect.

From this imperfect sketch of the legal history of the country, it is evident that the principal foundation of the laws of this State, in civil matters is, the Roman Law; indeed there are but few principles enunciated in the Code, the origin of which cannot be traced to the Roman jurists. Hence it has always been conceded by all intelligent members of the profession, that the study of the Roman Law, in connection with our own Code, is indispensably necessary for a thorough understanding of the laws of Louisiana.

Besides, there are other advantages to be derived from the study of the writings of the Roman lawyers; in them alone do we meet with that admirable union of theory and practice; that concise yet clear exposition of principles, forcibly illustrated by their application to striking cases, for which we look in vain in the works of other writers.

Troplong, one of the greatest jurists and most philosophic minds of the age, observes, in speaking of the comparative excellence of the Roman Law and the Civil Code:

"Ulpian, Gaius, Papinian, and their compeers, will always stand at the head of the science for their excellent logic and their profound views; their comprehensive decisions, the firmness of

their judgment, the delicacy and sagacity of their perception, the analytical power of their minds, elevate them above all of whom I have any knowledge; and there is not perhaps in the Code a single article which can be compared, for precision, for force, and for beauty of style, with the innumerable fragments which Trebonian has extracted from their writings. Nor can we too highly appreciate their efforts to give predominance in the Roman Law, to those enlarged, generous, and liberal views which have their origin in natural equity, to which the Constitution of Rome was so long inaccessible. But that which they could only attempt the Code has fully realized. The Code, by a movement more active and more rapid, has gone beyond the progressive impulse which they originated. To them belongs the artistic perfection; to the Code, the philosophic perfection; and it is the latter which most concerns the citizen. Between the law which they have handed down to us, and that which is embraced in the Civil Code, there is all the difference which exists between Paganism and Christianity—between stoicism and Christian morality.”

In the course of study which we propose to pursue, it is intended to combine, as far as possible, the dogmatical, the exegetical and the historical methods of teaching, for it is of equal importance to be acquainted with the text of the law, to understand its meaning and philosophy, and to know its origin and the modifications which it has undergone.

We shall, therefore, assiduously and diligently study the Code, in connection with the Roman, the Spanish, and the French Laws; we shall endeavor to ascertain the reason and intention of the law, and show its practical application to the concerns of life; and we shall trace, as succinctly and clearly as possible the source and development of the great principles of law.

In the execution of this plan, much assistance will be derived from the jurisprudence of the State, as settled by the decisions of the Supreme and other Courts. Jurisprudence, in the acceptance of the term as here used, consists in the concurrent and uniform exposition and application of the law by Courts of Justice; it exhibits as it were the whole vast and complicated machinery of the law in actual operation; and it has been not inaptly styled the *living law*. But while we acknowledge the great importance of this branch of legal learning, we must take heed not to lose sight of principles, in following the easy and beaten track of precedent. A mere *case lawyer* is like a third-

rate player, who repeats the words of others, without troubling himself whether he is uttering sense or nonsense. A well considered and well written judicial opinion, resting on sound and clearly developed legal principles, is a more efficacious method of communicating legal knowledge than any other that can be devised. But such is not always the character of the decisions of Courts of Justice; judges sometimes unwittingly indulge in freaks of fancy, or paradoxical propensities, to the utter disregard of the plainest principles of law; and then, their decisions instead of being safe guides are deceitful but solemn delusions, leading the confiding mind into error and confusion. The decisions of Courts should, therefore, be always studied in subordination to sound doctrine and correct principles.

Little or no advantage can be derived from the study of any work on the Roman law, written in the English language. We have not even a translation of the Pandects; the English version of the Institutes is inaccurate and imperfect. Strahan's translations of *Domat's Civil Law in its Natural Order*, is a work of great merit, though I cannot but think that the praise bestowed upon it by D'Aguesseau is exaggerated. I would recommend it to your careful perusal as one of the best introductions to the study of the Civil Law. A new edition has lately been published of this work under the editorship of Professor Cushing, of Harvard University. It is neatly printed, but it has lost much of its value by the omission of the texts of the Roman law, which are interspersed in the original work as well as in the translation as published by Strahan. Editors frequently take great liberties with the productions which they edit, both in the way of omission and addition, but it is a custom more honoured in the breach than the observance.

At a more advanced stage of his course, the student cannot select a safer guide than Pothier, who was one of the first authors by whom jurisprudence was popularized, and who has had the glory of furnishing a large portion of the materials for the Napoleon Code.

The best Commentaries on that Code, and at the same time on our own, are those of Toullier, Troplong, Marcadé, and Duranton, all in the French language.

One of the best commentators on the Spanish Law is Gregoria Lopez, whose views and opinions have always commanded great respect. He has written in Latin, and elucidates the Spanish law, by constantly referring to the Roman jurisprudence.

The German legal literature has been enriched, during the last half century, by some of the greatest productions on the modern Civil Law, to be met with in any language. Savigny, Hugo, Gluck, and others, have conferred imperishable glory on their language and country, by their works on the Roman Law.

Nor ought he who is desirous of acquiring eminence at the bar, neglect to invigorate his mind, by the study of the great writers of the sixteenth century, such as Cujacins, Donellus, Duarenus, &c. :

I trust, gentlemen, that it is not necessary to urge anything further, to satisfy you that the study of jurisprudence is not so dry and uninteresting, as is generally imagined by those who are unacquainted with the subject. How can the study of that science be tedious or irksome, which embraces almost the whole circle of human knowledge? "*Jurisprudentia est divinarum atque humanarum rerum notitia, justæ atque injustæ scientia.*" "Jurisprudence is the knowledge of things divine and human, the science of what is just and unjust."

But where is the mind, it may be asked, of sufficient grasp and power to master this universal science? Candor compels us to confess that no such mind has ever existed, and in all probability never will exist. Excellence in the science of jurisprudence is only relative; no man ever was a perfect master of it. Human life is too short, the powers of the human mind are too weak, to acquire a thorough knowledge of everything a lawyer ought to know. The studies requisite to secure a respectable standing in the ranks of the legal profession are long and difficult; the exertions of him whose aim is loftier, must be proportionably greater. I would recommend to your careful consideration and faithful observance, the following general rules :

1. Permanent success in the profession of law cannot be hoped for without serious and persevering study and application. The aspirant to eminence in our profession should never forget that Themis is a jealous mistress, who will not permit her votaries to worship at any other shrine. He must also bear in mind, that the course of study and labour to which he devotes himself, is not limited to a certain number of years, but must be persisted in, without any interruption, to the last day of his professional life. From the first moment he enters on the arena of forensic strife, he will find himself surrounded by hundreds of competitors, eager to outstrip him in the race; while those who have

the start of him will use their utmost exertion not to be overtaken.

2. Without proper method and system in his studies, no one can obtain any proficiency in the knowledge of the law. An irregular and superficial course of reading will never make a lawyer. In the science of the law, as in all others, we must commence at the beginning; make ourselves familiar with general principles; understand the reason of every rule of law, and discover the connection and harmony existing between every part of the system.

3. The reading of books and listening to lectures will be of little or no advantage, unless the student digests what he reads or listens to, by thought or reflection. The mind, like the stomach, may be surfeited by being overloaded. Many a man and especially among members of the legal profession, has made himself absolutely stupid by too much reading. Reading is the means, thought and reflection the end; the former furnishes the materials on which the latter exercises themselves.

4. An indispensable requisite for the practising lawyer, is business habits. In a large commercial city, particularly, it is necessary for the practitioner at the bar to be familiar, at least, with the manner in which commercial transactions are conducted, he ought to be acquainted with accounts, book keeping, &c. Unless he possess this knowledge he will frequently be at a loss to understand the case stated to him by his client, and of course, utterly unable to argue it to the court or jury, as an advocate.

5. Ministering at the altar of justice, the moral character of the lawyer must not only be without a stain, but should be, like Cæsar's wife, above suspicion. Weight of character is frequently of more advantage in the argument of a cause than the greatest power of intellect. Judge Story truly observes "even the lips of eloquence breathe nothing but an empty voice in the halls of justice, if the ear listens with distrust or suspicion."

But the question will naturally occur to all who have made choice of this arduous profession, what probability is there of attaining an elevated rank in it? You may perhaps be discouraged by the reflection, that many are called, but few are chosen. My answer, gentlemen, to these objections is, that success depends almost exclusively on yourselves. If you resolve to become good lawyers, and use the requisite exertions to accomplish your end, depend upon it, you cannot and will not fail. Everything

depends on a firm, unfaltering and an indomitable will ; let the word *impossible* be expunged from your vocabulary so far as your professional studies are concerned, and your efforts will be crowned with success. If on the other hand, you feel a lack of that energy and determination of which we have just spoken—if you prefer a life of listlessness and ease, the sooner you abandon the idea of studying and practising law, the better ; turn your attention to some other and more congenial pursuit ; and save yourselves from the mortification of remaining briefless lawyers all the days of your life.

In conclusion, I will quote the encouraging language of Prof. Story on a similar occasion :

“Enough has been said, perhaps more than enough, to satisfy the aspirant after judicial honours, that the path is arduous and requires the vigour of a long and active life. Let him not, however, look back in despondency upon a survey of the labour. The triumph, if achieved, is worth the sacrifice. If not achieved, still he will have risen by the attempt, and will sustain a nobler rank in the profession. If he may not rival the sagacity of Hardwicke, the rich and lucid learning of Mansfield, the marvellous judicial eloquence of Stowell, the close judgment of Parsons, the comprehensive reasoning of Marshall, and the choice attainments of Kent, yet he will by the contemplation and study of such models, exalt his own sense of the dignity of the profession, and invigorate his own intellectual powers. He will learn that there is a generous rivalry at the Bar ; and that every one there has his proper station and fame assigned to him ; and though one star differeth from another in glory, the light of each may yet be distinctly traced, as it moves on, until it is lost in that common distance, which buries all in a common darkness.”



## THE RIEL-SCOTT AFFAIR.

QUESTION.—Had the Dominion Government the power, or has it now the power, to take any legal steps to secure the punishment of Riel for the murder of Scott?

It is unnecessary to observe that except under the provisions of treaties—or for certain offences on the high seas—Canada could have no power to arrest or punish for crimes committed beyond her territorial limits: but it is alleged that under certain Imperial statutes passed for this particular purpose, jurisdiction was given to her, with reference to offences committed in the North West Territories beyond her limits—and that at the time of Scott's murder she had that power. It will be best, therefore, to see

1st. What that power was, to whom given, and where to be exercised.

2nd. Was such power transferred by the British North America Act of 1867, to the Dominion?

3rd. Could it have been executed before the occupation of and establishment of the Government of Manitoba?

4th. Since such occupation and establishment, constitutionally could it have been exercised in Manitoba?

5th. Under the Extradition Treaty with the United States, could or can Riel be demanded by the Dominion Government?

1st. In August, 1803, an Act was passed by the Imperial Parliament, known as 43 Geo. 3, c. 138, "for extending the jurisdiction of the Courts of Justice in the Provinces of Lower and Upper Canada, to the trial and punishment of persons guilty of crimes and offences within certain parts of North America *adjoining to the said Provinces*."

It recites that "whereas crimes and offences have been committed in the Indian Territories and other parts of America *not within the limits of the Provinces of Lower and Upper Canada, or either of them, or of the Jurisdiction of any of the Courts established in these Provinces, or within the limits of any Civil Government of the United States of America—and are, therefore, not cognizable by any jurisdiction whatever—and by reason*

thereof great crimes and offences have gone, and may hereafter go unpunished, and greatly increase." For remedy thereof it is enacted "That from and after the passing of that Act, all offences committed *within any of the Indian Territories or part of America not within the limits of Upper and Lower Canada*, or any Civil Government of the United States of America—shall be—and be deemed to be offences of the same nature, and shall be tried in the same manner and subject to the same punishment as if the same had been committed within the Provinces of Lower and Upper Canada."

The 2nd section then authorises the persons administering the Government of Lower Canada by commission, to empower any person or persons, wherever resident or being at the time, to act as Civil Magistrates and J. P's. for any of the Indian Territories or parts of America not within the limits of either of the said Provinces, or any Civil Government of the United States, as well as within the limits of either of the said Provinces, either upon information given within the said Provinces or out of them in any part of the Indian Territories or parts of America as aforesaid, for the purpose only of hearing crimes and offences—and committing any person or persons guilty of any crime or offence to safe custody in order to his being conveyed to Lower Canada to be dealt with according to law. And it is further provided that it shall be lawful for any person to apprehend such criminal and take him before the Commissioners, or to safely convey him to Lower Canada, there to be dealt with according to law.

The 3rd section provides that the party shall be tried in Lower Canada, as if the crime had been committed within the limits of that Province (or if the person administering the Government there thinks that in furtherance of justice, the party could be better tried in Upper Canada, he is authorised under the great seal of the Province of Lower Canada, to declare the same, and the party shall be tried in Upper Canada.) And similar power is given to issue subpoenas and other processes for enforcing attendance of witnesses in such Indian territories, as if the offence had been within the limits of the jurisdiction of the courts of Lower or Upper Canada.

The 4th and 5th sections have reference to foreigners, and do not bear upon this point.

In July, 1821, another Act was passed by the Imperial Parliament known as 1st and 2nd Geo. 4th, c. 66, "for regulating

the Fur trade and establishing a criminal and civil jurisdiction within certain parts of America."

The first four sections have no bearing. The fifth section extends the 43rd Geo. 3rd, c. 138, (just quoted) in its full extent to the Hudson's Bay Territories.

The 6th and 7th sections give the same jurisdiction, in *civil matters*, in the Indian territories to the Courts of Upper Canada, that the Courts of Lower or Upper Canada had within the limits of their respective Provinces.

The 8th section authorises the acting Governor of Lower Canada for the time being, *by Commission*, to authorise the persons who might be appointed J. P.'s. under that Act (1 and 2, Geo. 4, c. 66), in the Indian territories, etc., or who might be specially named in such Commission, to act as Commissioners to enforce in the Indian territories the orders of the Courts of Upper Canada, and in case of disobedience or resistance to such orders to commit the party disobeying, &c., to custody to be transmitted to Upper Canada, &c., there to be dealt with according to law.

The 9th section is in support of the 8th.

The 10th authorises the Queen to issue commissions to persons to act as J. P.'s in the Territories; and the Courts of Upper Canada may direct commissions to such J. P.'s so appointed to take evidence or try issues, or hold Courts, with like power and authority as are vested in the Courts of Upper Canada.

Down to this point the statute has reference to civil proceedings.

The 11th and 12th sections have reference to criminal matters. It is better to quote them in full:

"11th. And be it further enacted that it shall be lawful for His Majesty, notwithstanding anything contained in this Act or in any Charter granted to the said Governor and Company of Merchant Adventurers of England trading to Hudson's Bay, from time to time, by any Commission under the Great Seal, to authorise and empower any such persons so appointed Justices of the Peace, as aforesaid, to sit and hold Courts of Record for the trial of criminal offences and misdemeanors and also of civil cases, and it shall be lawful for His Majesty to order, direct and authorise the appointment of proper officers to act in aid of such Courts and Justices within the jurisdiction assigned to such Courts and Justices in any such Commission,

"anything in this Act or in any Charter of the Governor and Company of Merchant Adventurers of England trading to Hudson's Bay to the contrary notwithstanding."

"Section 12—Provided always, and be it further enacted, that such Courts shall be constituted as to the number of Justices to preside therein, and as to such places within said Territories of the said Company, or any Indian territories, or other parts of North America as aforesaid, and the times and manner of holding the same, as His Majesty shall from time to time order and direct; *but shall not try any offender upon any charge or indictment for any felony made the subject of capital punishment*, or for any offence or passing sentence affecting the life of any offender, or adjudge, or cause any offender to suffer capital punishment or transportation, or take cognizance of or try any civil action or suit, in which the *cause of such* suit or action shall exceed in value the amount or sum of £200, and in every case of any offence *subjecting the person committing the same to capital punishment or transportation* the Court or any Judge of any such Court, or any Justice or Justices of the Peace, before whom any such offender shall be brought, shall commit such offender to safe custody, and cause such offender to be sent into such custody for trial in the Court of the Province of Upper Canada."

It will thus be seen that under these two Acts, the power given was to arrest the murderer *to be sent to Canada for trial*. Under the first Act through the instrumentality of Justices of the Peace specially appointed by the Government of Lower Canada, and further under the 2nd Act through the instrumentality of local officers appointed by the Imperial Government. That the jurisdiction created is of a limited and exceptional character, and the legislation being of a criminal nature must be construed strictly. That the proceedings must be initiated by information before such J. P.'s or officers in the usual way, and to be in the same manner in every respect as if the offence had been committed within the jurisdiction of the Court of Lower or Upper Canada trying the same.

The next point is to see whether this power was by the British North America Act of 1867, transferred to the Dominion.

It will be borne in mind that the powers created by the two foregoing Acts were extra territorial powers given to Lower and Upper Canada separately to be exercised *in relation to the Indian*

Territories, the Hudson's Bay Territories, and certain parts of North America "*adjoining to the said Provinces,*" a right not incidental to or necessary for *their* Government, or vesting in the said Provinces any interests in those Territories, but to be exercised solely for the benefit of those Territories themselves.

It becomes important now to see how this matter was disposed of by the Act of Union of 1841, and whether in the subsequent Act of 1867 any difference is made. The 3 and 4 Vic. c. 36, passed by the Imperial Parliament in 1840, intituled "An Act to reunite the Provinces of Upper and Lower Canada, and for the Government of Canada" declares by section 45 that all powers, authorities and functions which by the said Act (referring to George 3rd, c. 31, A.D. 1791,) or by any other *Act of Parliament*, or by any Act of the Legislature of the Provinces of Upper and Lower Canada respectively, are vested in, or are authorized, or required to be exercised by the respective Governors of the said Provinces . . . shall, in so far as the same are not repugnant to or inconsistent with the provisions of this Act, be exercised by the Government of the Province of Canada."

Section 46. "That all laws, statutes and provisions which at the time of the union of the Provinces of Upper and Lower Canada shall be in force within the said Provinces or either of them, shall remain and continue to be of the same force, authority and effect, &c., &c."

Section 47. "That all the Courts of Civil and Criminal jurisdiction in either of the Provinces of Upper and Lower Canada at the time of the union of the said Provinces and all legal commissions, powers and authorities, &c., shall continue to subsist, &c."

Now, in these sections there are no words of qualification as to the subject matter *relative to which* those powers are to be exercised. They were left as broad and as comprehensive as before the Act was passed, in no way curtailed or restricted, only the powers to be exercised were to be by United Canada instead of Upper and Lower Canada separately. But how is it when the same subject is referred to in the British North America Act of 1867 and the corresponding sections are examined. By the 12th Section of the British North America Act of 1867—under which Act alone the Dominion Government exists—the powers and authorities, and functions, which under any *Imperial* Acts or any

local Acts of the several Provinces were exercisable by their respective Governors, with the advice of their Councils at the time of the union were "*as the same continued in existence and were capable of being exercised after the union in relation to the Government of Canada,*" transferred to and made exercisable by the Governor-General, &c. And by the 56th section all powers and authorities and functions, which under any such Acts, were at the time of the union vested in, or made exercisable by the Lieutenant-Governors of the Provinces, with the advice of their Councils, were "*as far as the same were capable of being exercised after the union in relation to the Governments of Ontario and Quebec respectively,*" vested in and made exercisable by the Lieutenant-Governors of Ontario and Quebec respectively.

(The 64th section had previously provided that so far as Nova Scotia and New Brunswick were concerned, the constitution of the Executive authority in each of these Provinces should, subject to the provisions of the British North America Act, continue as it existed at the union, until altered under the authority of the Act; and the Dominion of Canada was by the 3rd section formed of the then Provinces of Canada, Nova Scotia and New Brunswick, thereby defining its territory.) The 65th section thus clearly removes any doubt as to what was intended by the expression "*in relation to the Government of Canada,*" in the 12th section; shewing that it was to be considered (as to the application of the powers referred to) in a territorial sense only. Otherwise the expression "*in relation to the Government of Ontario and Quebec respectively*" in the 65th section would be without meaning—or this absurdity would follow—that the Province of Lower Canada or the Province of Canada as composed of Upper and Lower Canada and inheritor of their powers by virtue of the Act of Union of 1841 (in contradistinction to its present organization under the Act of 1867, and its subsequent rights acquired under the Rupert's Land Act, 1868), would retain the power of appointing Justices of the Peace in and for the North-West Territories, and that criminals arrested there or in Manitoba, notwithstanding its present status, must still be brought to Upper Canada for trial; (inasmuch as those old Acts were not repealed in words, and under them the power to arrest for capital felonies gave no power of trial there.)

But the Act of 1841 was superseded by the Act of 1867, which expressly limited the powers conferred by any previous Imperial

Acts to the test of their "being exercised in relation to the Government of Canada." The Canada of 1841 was reconstructed by the Act of 1867—with increased area—but curtailed local powers—with a different constitution clearly defined, and *an administration of criminal justice clearly distributed in a different way*. It was not contemplated that the abnormal mode of catching a criminal at the foot of the Rocky Mountains, and bringing him 2000 miles to Upper Canada for trial, should continue, and, therefore, no provisions were made in the Act of 1867, by which the jurisdiction created by the Imperial Acts of 1803 and 1821, and given to the Canada of 1841, should be continued to the Canada of 1867. It is true, the Acts of 1804 and 1821, were not repealed, because *there were provisions in them relating to other matters in the North-West Territories*, but express words were inserted in the Act of 1867, to negative even the presumption of the continuance of the criminal jurisdiction of Canada, and as preparatory to the altered circumstances which would necessarily follow from the acquisition of those territories. They were not left without law. "The Rupert's Land Act of 1868," is a clear recognition that there was law there, but that law it was not given to Canada after 1867 to administer, until she became the legal owner of the domain. This is the more apparent, because by an Imperial Act passed in 1859, the 22-23rd Vic. c. 26, intituled "An Act to make further provision for the regulation of the trade with the Indians, and for the administration of justice in the north-western territories of America," the same power with which Canada was then clothed, of having criminals arrested there and sent to Upper Canada for trial, was extended to British Columbia, and concurrent and equal jurisdiction given to the courts of that colony. Thus, when eight years afterwards in 1867, the British Parliament used the terms, "*in relation to the Government of Canada*," it was done with the full knowledge that it had already provided for the punishment of criminals in those territories by tribunals other than those of Upper Canada, *and in view of future arrangements, in defining the powers of the Federal Government of Canada*, it determined that those powers should correspond with its territory. Therefore at the time of the Scott murder the North-West Territories constituted no part of and were not under the jurisdiction of the Government of Canada, and Canada could not at that time appoint a Magistrate or arrest a man there. The subsequent

order in Council of June 23rd, 1870, under the Imperial Act,—“The Rupert’s Land Act, 1868,”—from and after the 15th day of July, 1870, again gave jurisdiction to Canada (and outside of Manitoba which now stands on other grounds) the power of Canada to govern there and establish “laws, institutions and ordinances,” now exists. Between these two periods, July, 1867, and July, 1870, the administration of criminal justice there was in the hands of the authorities of the Hudson’s Bay Company, of the British Government and of British Columbia.

This is the more clear because the same Rupert’s Land Act of 1868, which gave to Canada the power, *after* the Order in Council to govern the territories, expressly provided that *until after* the date mentioned in such order, the Parliament of Canada enacted other laws, the existing laws and authorities *within* the territory should continue in force. Thus, to speak legally, the Canadian jurisdiction was destroyed by the act of 1867. The existing authority *within* was declared continued by the Act of 1868, and by the Order in Council of June, 1870, the authority of Canada was restored and made exclusive from and after the 15th July, 1870. Scott’s murder was in December, 1869.

The 64th section declaring that the constitution of the executive authority in Nova Scotia and New Brunswick was to remain as before, &c., preceding immediately as it did the section which conferred executive powers upon the Government of Ontario and Quebec, also shews that the powers referred to were for local and not for extra territorial purposes.

This very significant distinction between the two acts of 1841 and 1867 indicates the intentions of the British Parliament in passing them.

It is plain, therefore, from the above limitations, that the powers which had been previously exercised by the Provinces of Lower and Upper Canada, or the Province of Canada after 1841 and previous to July, 1867, *in relation to the Indian and Hudson’s Bay Territories* and “parts of America adjoining the two Provinces,” under the Imperial Acts referred to, were not transferred by the British North America Act of 1867 to the Dominion Government;—no doubt designedly omitted, as the peaceful acquisition of those territories, and their constitutional incorporation into the Union were contemplated from its first inception.

The 3rd point it is not necessary to discuss, because it is an admitted fact that from the time of Scott’s murder until the



bugles of the 60th sounded the advance upon the slopes leading to Fort Garry, the Dominion Government had not practically the power of enforcing any legal authority whatever in Manitoba or its vicinity.

As to the 4th: Since the establishment of constitutional government in Manitoba, which immediately followed the occupation of Fort Garry, the "administration of criminal justice" was by the British North America Act, vested in the Local Government, and the Dominion Government could not possibly interfere.

As to the 5th, under the above construction of the Imperial Act, the Dominion Government could have no legal right to demand the surrender of Riel. The British Government alone had that power, as the offence was against her laws and not against those of the Dominion; but the authorities in the United States have always considered causes such as Riel's as political, and, therefore not coming within the scope of the treaty. It is true that judicially it has been considered that in order to exclude such from the treaty, it must be shown that the offence charged was in furtherance of the political object which it is alleged was sought to be obtained, and, we believe, that Scott's murder was not in furtherance of any such object, but the authorities to whom application would have to be made would be the judges, and no sane man can doubt what the decision would be. Leaving out, however, all question of details, which, in such cases, are numerous and complicated, an application by the Dominion Government for Riel's extradition under the Ashburton Treaty would be at once met by the objection that the crime was not committed *within the jurisdiction of the Dominion Government*, and, on other grounds, the demand would be declared inadmissible.

For these reasons, it does not appear to me that the Dominion Government could have taken or could now take any legal steps to secure Reil's punishment as long as he is abroad, but as there is no Statute of Limitations with reference to murder, assuredly should he ever come within the Dominion, justice will be found to reach him, and hands to take him.

I have placed the question solely in its legal aspect, merely as to whether the Dominion Government had, under the constitution, the right or not. I have avoided, as far as possible, even the insertion of a word which could have a political bearing, because I think that the point should be considered and determined without prejudice.

J. H. GRAY.

## THE TREATY OF WASHINGTON.

The great problems of international law which were submitted to the consideration of the Joint High Commission are represented as having at last reached a solution. On the 8th of May the Commissioners signed, at Washington, a treaty by which they propose to settle the questions of the Alabama Claims, the Canadian Inshore Fisheries, the St. Lawrence Canals and other matters submitted to their investigation, upon bases very nearly the same as those which have been from time to time telegraphed to New York by correspondents of the press of that city, notwithstanding the alleged secrecy of the negotiations. The Treaty itself was to have remained secret for some time after its execution. But some of the Washington officials seem no more capable of keeping a secret than was the woman in the fable. The Treaty had scarcely been printed for the use of the Senate when secrecy was violated to favour a correspondent of a New York daily paper, and on the 10th of May that paper published to the world the entire text of the Joint High Commission's decision. It need scarcely be said that the conduct of the official who thus betrayed his trust, and the conduct of the correspondent who profited by his dereliction of duty, were equally dishonourable and disgraceful. It is needless to add that since that time no one concerned in the negotiations considers himself bound to secrecy. The text of the Treaty has made the round of the press of both continents; and almost all the interested parties, from the Legislative bodies down to the humblest village gazette, from the senator to the simplest fisherman of our maritime shores, have already discussed and criticised its stipulations. May we not be permitted to express in the *Revue Critique* an unbiassed opinion upon this novel and memorable Treaty?

It is true that the *Revue Critique* does not interfere with political questions. Its founders designed it to be a review devoted to legislation and jurisprudence. But is not the Treaty of Washington the draft of a legislative enactment much more important than most of the bills passed by the Legislature of the Dominion or by the Imperial Parliament? The *Revue Critique* could not, therefore, without failing in its mission, close its pages against a critical study of the Treaty in its bearing upon

law and justice. The essay which we lay before the reader has been written from a purely legal point of view, and in a spirit of freedom from all influence of passion, faction or political feeling, and we trust that it will be accepted as such by the public.

#### I.—THE ALABAMA CLAIMS.

In order that the reader may obtain a clear perception of the effect and scope of that part of the Treaty which relates to the Alabama claims, we will lay before him a historical sketch of this celebrated dispute.

At the close of the American civil war, Mr. Adams, the United States minister to Great Britain, in a correspondence with Earl Russell, beginning April 7, 1865, and closing with a letter of Nov. 3, 1865,\* reviews the alleged failures of Great Britain to fulfil her obligations as a neutral, and demands compensation for the injuries resulting to the United States.

In his letter of April 7, Mr. Adams argues that formidable vessels of war have gone from British ports, and entered at once on their hostile career, without ever visiting a port of the Confederacy, the crews and armaments being British, as well as the vessels and their stores; that these have been procured by rebel agencies openly employed in Liverpool; that these acts have been in violation of our rights, and have been caused by the fact that Great Britain accorded belligerent rights to the rebels *in an unprecedented and precipitate manner*;† and that under the circumstances this amounted to a creation of the maritime belligerency of the rebels out of British materials, the result of which had been the gradual transfer of commerce from American to British flags and vessels.

Earl Russell (May, 1865) defends the course of Great Britain in recognising the belligerency of the South, and repudiates all liability for any actual or supposed consequences thereof. As to the building and equipping of vessels, he urges that the British Government had acted honestly and in good faith, and finally

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\* Dana's edition of Wheaton, Int. Law, 1866, contains a summary of this memorable correspondence, from which our statements are extracted.

† A former correspondence explains that by this was meant that Great Britain had recognized the South as a maritime belligerent before a single vessel of the Confederacy had reached a British port.

takes the ground "that if the Government does that, it is not answerable for the consequences if a vessel is fitted out and sails from Great Britain, *in violation of her laws*, and commits hostilities beyond her jurisdiction."

Earl Russell to Mr. Adams (Aug. 30, 1865) refuses to submit the matter to arbitration "on the ground that the decision of the umpire must depend upon the answer to two questions—*neither of which Great Britain could put to arbitration, with due regard to her own dignity and character*,—first, whether the Government has acted in good faith and with due diligence in executing its laws; and second, whether the law officers of the Crown properly understood the British statutes when they advised against legal proceedings."

Oct. 17, 1865: Mr. Adams says that "in view of the reasons assigned by the British Government for refusing an arbitration, no proposal of that kind for the settlement of existing differences will henceforward be insisted upon or submitted by the United States."

Nov. 3, 1865: Earl Russell proposes a Commission to settle any claims (not involving the two points specified) which the Governments might agree to submit to it.

Nov. 21, 1865: Mr. Adams to Earl of Clarendon gives the refusal of the United States Government to agree upon a Commission to settle particular claims between the two Governments arising out of the war, so long as Great Britain, for the reason she assigns, refuses to submit the great claims the United States are now urging.

Lord Clarendon to Mr. Adams, Dec. 2, 1865, declines to continue the correspondence.

From the date of this rupture public opinion began to discuss all the possible means by which the Anglo-American conflict on the Alabama claims might be brought to a solution at once just and equitable in itself and honourable to the two great interested powers. The Press and the Boards of Trade repeatedly agitated the matter. Every one seemed to agree in a desire to see it decided by arbitration. Mr. Westlake, in a letter addressed to the London *Daily News* (23rd January, 1868), points out, however, the extreme difficulty of finding an umpire who in a contest of this kind could be absolutely impartial. He, therefore, suggests that an International Congress would be more suitable to put an end to the dispute in a just and satisfactory manner. Dr.

Bluntschli, treating the same question in his last work on International Law, cites and approves the suggestion of Professor Lieber that it should be submitted for decision to the judgment of one of the most celebrated faculties of law.\*

While individual plans of arrangement were being proposed and discussed, the authorities were not inactive. The negotiations re-opened between the Governments of Great Britain and that of the United States, resulted in the Clarendon-Johnson treaty of the 14th January, 1869, by which all claims brought forward since the Treaty of 1853 by subjects of Her Majesty against the United States Government, and by citizens of the United States against the Government of Great Britain, were referred to four Commissioners, "the high contracting parties engaging to consider the award of two arbitrators as a complete and definitive settlement of all claims brought against the one or the other of them upon matters anterior to the exchange of ratifications."†

When the Clarendon-Johnson Treaty was discussed in the United States Senate, the principal reproach made against it by Senator Sumner in his famous speech was that it treated a great question of national interest as if it were a wretched question of money, that it disregarded the most serious grievances of the American nation to take notice only of the private claims of a few merchants and shipowners. Mr. Sumner, in conclusion, expressed his confidence that a frank expression of regret by England for the wrongs committed by her against the United States should be a *sine quâ non* of a just reconciliation, and would be the best guarantee of that continued harmony between the sister powers, which must be the prayer of all. The Treaty was rejected by the American Senate by a majority of 54 to 1. (18th February, 1869.)

M. Rolin-Jaequemyns, speaking of that rejection, says that "what the United States have most at heart is a moral satisfaction," and he suggests the reparation of the wrong by means of an Act of Parliament embodying a new declaration of principles for the future, and an expression of regret for the past, *par voie d'acte du Parlement emportant une nouvelle déclaration de principes pour l'avenir, et l'expression d'une regret pour le passé.*‡

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\* Revue du Dr. Int. vol. 1, p. 154, 449.

† Ibid, vol. 1, p. 450-456.

‡ Ibid, vol. i, p. 449-456.

The action of the United States Senate was naturally ill calculated to calm the public mind. The tone of the American press grew every day more bitter, if not positively insolent. The Alabama question became a popular subject of controversy, and was continually debated on both sides of the Atlantic. While the excitement was at its height (in 1870), Dr. Bluntschli published in the *Revue de Droit International* his "*Opinion Impartiale sur la Question de l'Alabama et la manière de la résoudre*," which was deservedly reproduced by the European and American press, and appeared in the first number of the *Revue Critique* (January last). The conclusions at which he arrived are so much in accordance with the rules laid down by the Washington Treaty that we cannot forbear to place them again before our readers.

After having scouted the idea of an apology on the part of Great Britain from considerations of policy and not from legal motives—for, as he observes, a party who violates the law can and ought to avow it,—the learned professor concludes:

"I. The recognition of the Southern States as a belligerent power and the declaration of neutrality did not constitute a violation of international law by Great Britain and France. In deciding upon these steps, the European states only exercised their right, however serious may be the reasons to be urged against its expediency.

"Therefore, the United States, however disastrous the recognition may have been to them, are not justified in exacting from Great Britain or France a satisfaction or reparation, which could be demanded only in case the law had been violated.

"II. Taking it for granted that the accusations made against the English Government, with respect to the arming of the Alabama, and her undisturbed departure from an English port, are substantially true, a culpable non-fulfilment of the duties of a neutral and friendly State towards the Union presents itself, and on this ground the latter has a right to ask satisfaction and reparation from Great Britain.

"II. The owners of American ships and merchandise destroyed (by the corsairs) have no private claim for damages against the British Government, but the government of the Union can take charge of and protect their interests in the settlement of the pending dispute with Great Britain.

"IV. The true solution of the difficulty is to combine a material reparation, destined to indemnify the American claimants, with a moral guarantee to the commercial and shipping interests that similar injuries shall not be repeated. The first of these objects will be attained by means of a fair pecuniary indemnity paid by Great Britain to the Union, in order to be divided among the sufferers; the second by a new proclamation of the duty imposed on neutral and friendly States to prevent, as far as possible, any abuse of their neutral territories for the organization of military expeditions."

Finally, the message of President Grant to the Senate and House of Representatives of the United States, delivered on the 5th of December, 1870, and couched in the strongest language, added to the great mass of the Alabama difficulties, the questions of the Northern Inshore Fisheries, and the Free Navigation of the River St. Lawrence; and we cannot conceal from ourselves the fact that the Joint High Commission, entrusted with full power to sign any treaty settling all difficulties between the two Great Powers as it might see fit, was named under the effect of the Presidential message.

It must be admitted that the Fisheries and St. Lawrence Navigation questions should have been referred to another Commission than the one charged with the settlement of the Alabama claims. The Treaty of Washington, although not technically a treaty of peace, partakes of the nature of a treaty of peace, by reason of the menacing character of the Alabama claims; for, as Senator Sumner said in the Senate at Washington on the 19th of May last, "upon its ratification or rejection depends in a great measure the character of the relations which, in the future, will exist between the two governments." It is easy to understand that the feeling which should guide a Commission entrusted with the task of making reparation for a great international wrong, is not by any means the most desirable one in drawing up an equitable commercial treaty on the subject of the Fisheries and the St. Lawrence Navigation. The two matters are quite distinct, and are governed by very different principles; the one by the rules of the law of war, the other by the principles of friendly and reciprocal intercourse. They should, therefore, have been settled by different umpires and at different times. The settlement of the various Americo-Canadian disputes would, un-

doubtedly, offer a weightier assurance of justice, if, as the Dominion Government had demanded,\* it had been the work of a Mixed Commission, composed of an English Commissioner, an American Commissioner and a Canadian Commissioner. Such an act of justice was due to Canada, more particularly in view of the fact that she had had no share, either active or passive, in the arming of the Alabama and other privateers, nor in any act hostile to the Government of the United States during the great civil war. Nay, more, the Canadian Government had maintained at great cost a military force upon the American frontier to protect it from raids by Southern refugees in Canada. In the affair of the St. Alban's Raid, it voluntarily hastened to make compensation for the damages sustained, although the raid, authorized as it was by the Confederate Government, had been organized with the greatest secrecy. This *semi-sovereign and irresponsible Government*—as the President's message sneeringly designates the Colonial Government—had, therefore, claims on the United States Government to a justice, free and disengaged from all political complications growing out of the foreign policy of the Mother Country. But the just policy of the Canadian Government has not met with the return which it deserved; and all that remains for us is to examine the Treaty in its clauses and its effects.

About the beginning of March last the Joint High Commission assembled at Washington. Of all their deliberations, from the 4th of March until the 3rd of May, 1871, nothing is known beyond what they thought fit to insert in the 36th protocol, of date the 4th of May.

The first protocol shows that the Commissioners determined that "the discussion might include such matters as might be mutually agreed upon."

The second shows that the Commissioners "proceeded with the consideration of the matters referred to them."

All the protocols, from the 3rd to the 34th inclusive, are precisely similar, and worded as follows: "The High Commissioners having met, the protocol of the Conference held on the — was read and confirmed. The High Commissioners

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\* Annual Report of the Department of Marine and Fisheries (Ottawa, 1871), p. 75.

Return Correspondence between the Government of the Dominion and the Imperial Government on the subject of the Fisheries, p. 40.



then proceeded with the consideration of the matters referred to them. The Conference was adjourned to the—— of ——."

That private notes of the deliberations have been taken there can be no doubt; for otherwise the statement contained in the 36th protocol could not have been drawn up. A telegram of the 10th June informs us that Earl de Grey, Sir Stafford Northcote, Professor Bernard, Sir Edward Thornton and Lord Tenterden, at the conclusion of each day's session, made up a journal of the day's deliberations, which was at their leisure written out in full, so as to form a complete and accurate history of the progress of their labours, the different opinions expressed in the formation of the different articles of the Treaty, as well as the construction which should be given to each portion of its articles. The telegram adds that the result of their labours, together with all books of reference, will be fyled in the British Foreign Office for future reference.

According to the 35th protocol, "the Joint High Commissioners determined that they would embody in protocol a statement containing an account of the negotiations upon the various subjects included in the Treaty, and they instructed the joint protocolists to prepare such an account in the order in which the subjects are to stand in the Treaty."

On the 4th of May, the High Commissioners met to receive the statement, prepared by the joint protocolists, in accordance with the request of the Joint High Commission at the last Conference.

From that statement contained in the 36th protocol, it appears that at the Conference held on the 8th day of March, the American Commissioners stated that the people and government of the United States felt that by the course and conduct (already stated) of Great Britain, "they had sustained a great wrong to an amount of about fourteen millions of dollars without interest, which amount was liable to be increased by claims which had not been presented;" that "they hoped that the British Commissioners would be able" to place upon record an expression of regret by Her Majesty's Government for the depredations committed by the vessels whose acts were now under discussion, and to agree upon a sum which should be paid by Great Britain to the United States in satisfaction of all claims and the interest thereon."

The British Commissioners answered that "Her Majesty's

Government, could not admit that Great Britain had failed to discharge towards the United States the duties imposed upon her by the rules of international law, or that she was justly liable to make good to the United States the losses occasioned by the acts of the cruisers; that they were instructed to propose on behalf of their Government the offer of arbitration."

The American Commissioners replied "that they could not consent to submit the question to arbitration unless the principles which should govern the arbitrator could be agreed upon."

These principles were submitted and discussed at the Conference of the 10th, 13th and 14th, but without result. Finally, at the Conference of the 6th of April, the British Commissioners admitted the principles under the reservations contained in the Treaty.

After having at the Conferences of the 6th, 8th, 9th, 10th and 12th April, considered the procedure to be followed by the arbitrators, the American Commissioners "referring to the hope which they had expressed on the 8th of March, inquired whether the British Commissioners were prepared to place upon record an expression of regret by Her Majesty's Government, to which inquiry the British Commissioners declared that they were authorized to express in a friendly spirit the regret felt by Her Majesty's Government for the escape, under whatever circumstances, of the Alabama and other vessels, and for the depredations committed by these vessels." The American Commissioners accept this expression of regret as very satisfactory.

Articles 12 to 17 having reference to the private claims of British subjects and of American citizens, were agreed to, on the assurance of the British Commissioners that by the laws of England British subjects had long been prohibited from purchasing or dealing in slaves not only within the Dominions of the British Crown, but in any foreign country, and that they had no hesitation in saying that no claim on behalf of any British subject for slaves or for any property or interest in slaves would be presented by the Government. It was thus that the whole subject of the Clarendon-Johnson Treaty was summarily disposed of in a few hours, while more than a month was necessary to complete what Mr. Rolin-Jaequemyns terms *la satisfaction morale*, and what Mr. Sumner indicated as an avowal of wrong.

Articles 1 to 17 of the Treaty correspond to those decisions of protocol 36.

ARTICLE 1.—Whereas differences have arisen between the Government of the United States and the Government of Her Britannic Majesty, and still exist, growing out of the acts committed by the several vessels which have given rise to the claims generally known as the Alabama Claims, and whereas Her Britannic Majesty has authorized her High Commissioners and Plenipotentiaries to express, in a friendly spirit, the regret felt by Her Majesty's Government for the escape, under whatever circumstances, of the Alabama and other vessels from British ports, and for the depredations committed by those vessels; now, in order to remove and adjust all complaints and claims on the part of the United States, and to provide for the speedy settlement of such claims which are not admitted by Her Britannic Majesty's Government, the high contracting parties agree that all the said claims growing out of acts committed by the aforesaid vessels, and generally known as the Alabama Claims, shall be referred to a Tribunal of Arbitration, to be composed of five arbitrators, to be appointed in the following manner, that is to say:—The first shall be named by the President of the United States, one shall be named by Her Britannic Majesty, His Majesty the King of Italy shall be requested to name one, the President of the Swiss Confederation shall be requested to name one, and His Majesty the Emperor of Brazil shall be requested to name one.

The procedure to be followed by the arbitrators as well as the extent of their powers are minutely detailed in articles 1, 2, 3, 4 and 5. We find that the majority is empowered to decide,—the Treaty thus offering a new affirmation of the doctrine defended by Fiore and other publicists and invoked in the *Revue Critique* with regard to the Provincial Arbitration,—that in international arbitration the parties must establish by their compromise the mode of procedure and the limit of the powers granted to the arbitrators.

Articles 6 and 7 are as follows:

ARTICLE 6.—In deciding the matters submitted to the arbitrators, they shall be governed by the following three rules to be taken as applicable to the case, and by such principles of international law not inconsistent therewith, as the arbitrators shall determine to have been applicable to the case.

RULES.—A neutral Government is bound—

*First:* To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace, and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessels having been specially adapted, in whole or in part, within such jurisdiction to warlike use.

*Secondly:* Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

*Thirdly:* To exercise due diligence in its own ports and waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

Her Britannic Majesty has commanded her High Commissioners and Plenipotentiaries to declare that Her Majesty's Government cannot assent to the foregoing rules, as a statement of principles of international law which were in force at the time when the claims mentioned in Article 1 arose, but that Her Britannic Majesty's Government, in order to evince its desire of strengthening the friendly relations between the two countries, and of making satisfactory provision for the future, agrees that, in deciding the questions between the two countries, arising out of these claims, the arbitrators should assume that her Majesty's Government had undertaken to act upon the principles set forth in these rules, and the high contracting parties agree to observe these rules between themselves in future, and to bring them to the knowledge of other Maritime Powers, and to invite them to accede to them.

ART. 7.—The decision of the tribunal shall, if possible, be made within three months from the close of the argument on both sides. It shall be made in writing, and dated, and shall be signed by the arbitrators who may assent to it. The said tribunal shall first determine as to each vessel separately, whether Great Britain, by any act or omission, failed to fulfil any of the duties set forth in the foregoing three rules, or recognized by the principles of international law, not inconsistent with such rules, and shall certify such fact as to each of the said vessels. In case the tribunal find that Great Britain has failed to fulfil any duty or duties, as aforesaid, it may, if it think proper, proceed to award a sum in gross to be paid by Great Britain to the United States for all the claims referred to it; and in such case the gross sum so awarded shall be paid in coin by the Government of Great Britain to the Government of the United States at Washington, within twelve months after the date of the award. The award shall be in duplicate, one copy whereof shall be delivered to the agent of the United States for his Government, and the other copy shall be delivered to the agent of Great Britain for his Government.

All that precedes, relates only to the claims of the United States Government; claims made by citizens of the United States (exclusive of such as spring out of the depredations of the vessels mentioned in the 1st article), or by subjects of Her Majesty for causes arising out of the civil war, are provided for by article 12.

"ART. 12. The high contracting parties agree that all claims on the part of corporations, companies, or private individuals—citizens of the United States—upon the Government of Her Britannic Majesty, arising out of acts committed against the persons or property of citizens of the United States during the period between the 13th of April, 1861, and the 9th of April, 1865, inclusive (not being claims growing out of the acts of the vessels referred to in Article 1 of this treaty), and all claims with the like exception on the part of corporations, companies, or private individuals, subjects of Her Britannic Majesty upon the Government of the United States, arising out of acts committed against the persons or property of subjects of Her Britannic Majesty during the same period, which may have been presented to either Government for its interposition with the other, and which yet remain unsettled, as well as any other such claims which may be presented within the time specified in Article 14 of this treaty, shall be referred to three Commissioners, to be appointed in the following manner: that is to say, one Commissioner shall be named by the President of the United States, one by Her Britannic Majesty, and a third by the President of the United States and Her Britannic Majesty conjointly; and in case the third Commissioner shall not have been so named within a period of three months from the date of the exchange of the ratifications of this treaty, then the third Commissioner shall be named by the representative at Washington of His Majesty the King of Spain."

We may observe, *en passant*, that the private claims specially indicated in the Clarendon-Johnson Treaty as having been preferred since the Treaty of 1853 are not even alluded to in the Treaty.

Articles 8, 9, 10 and 11, as well as the whole of Articles 13, 14, 16 and 17, have reference only to the procedure and are of no special interest.

We must nevertheless remark that no rules of law are laid down for the guidance of the arbitrators, as in the case of the Alabama claims. They are instructed to "investigate and decide such claims in such order and in such manner as they may think proper," upon such proof or information as may be furnished them by or on behalf of the respective Governments (Art. 13). Thus they are *amiables compositeurs* rather than arbitrators.

Such are the provisions of the Treaty respecting the divers claims arising out of the American Civil War. They take effect from the day of exchange of ratifications at Washington or at London within six months after the date of the Treaty (8th May

1871). As this part of the Treaty makes no cession of territory or sovereignty, the consent of the British parliament is not required.\*

To what conclusion should we come as to the value of this settlement of the Alabama claims? The English press has greatly extolled the arrangement as highly honourable; the American press is entirely satisfied with it; in Canada public opinion has pronounced with scarcely a dissenting voice that the interests of the Dominion have been sacrificed in order to obtain its execution. If by the word *honourable* it be meant that the Treaty is just and agreeable to the principles of international law, the Treaty may be admitted to be an honourable one. But if it means that the pretensions of Great Britain have been maintained the Treaty is as clearly a dishonourable one.

Bluntschli says of the apology demanded for these depredations of the Southern privateers: "A formal avowal of culpability, however praiseworthy a step when viewed from the standpoint of justice and morality, is inevitably felt by the nation in fault as an act of degrading weakness. This consideration alone suffices to prevent its being exacted from a great power."

The American Commissioners have not hesitated to demand this apology, which they have after some delay, succeeded in obtaining. The expression "in a friendly spirit of the regret felt by Her Majesty's Government for the escape *under whatever circumstances* of the Alabama and other vessels from British ports," will have the whole force of an apology, if the arbitration tribunal decides, (as there can be no doubt it will seeing that Great Britain has abandoned her legal pretensions,) that Great Britain has violated the rules of international law, and holds her responsible for the escape of the privateers.

In the second place, the American Commissioners have succeeded in wresting from the British Commissioners the recognition of the three rules of neutrality contained in article 6 as making in future a portion of public international law.

On this point again, Great Britain abandons all her arguments and principles. Until now she had constantly replied to the demands of the United States that her good faith protected her from the consequences of her acts. The Treaty, far from admitting that doctrine, has sanctioned the opposite one, which is but

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\* Forsyth Const. Law, pp. 182-187.

an application of the principle of the Roman Law that every one capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, omission, imprudence, neglect or want of skill.

It is true that Great Britain declares in the Treaty itself that she cannot assent to the foregoing rules as a statement of principles of international law which were in force at the time when the claims mentioned in Article 1 arose. What! these rules, which are based upon sound reason and not upon usage did not exist at the time of the escape of the Alabama and other cruisers! Is it because Great Britain has understood her duties only as defined by her own municipal laws? Clearly not. Her responsibility arises from international law and not from her own statutes and it is measured by the law of nations. Those statutes are only means to assist the State in fulfilling its international duties and cannot set any limit to these duties. The three rules acknowledged by the Treaty form an integral part of international law, not because the high contracting parties have been pleased to promulgate or proclaim them, but because they are founded on natural law. From the first, the United States maintained them both by the decisions of their Courts and by their diplomatic correspondence, and for centuries past jurists of the highest authority have proclaimed them as rules of international law. They are immutable and eternal truths; and to say that they were not in force in 1861 and down to the end of the American Civil War, is to admit in a disguised way that they were unknown to the English Crown law officers; it is to make a new mistake in disregarding the fact that international law everywhere is and always has been the same. A formal declaration that, at the time above referred to, the duties of neutrality were not understood in the manner laid down in the three rules in question would have been more exact and to the point. And finally, the consent given by Great Britain to the proposal that these three rules should be applied to all claims submitted to arbitration is a further proof of want of that frankness so honourable in every one, but especially so in a great nation.

Let us even suppose that these rules did not exist at the time of the escape of the Alabama. In proposing to give to the three rules a retroactive effect the English Commissioners are endeavouring to introduce into the law of nations an immoral principle of the most dangerous tendency. Dwarria, speaking of the retro-

activity of municipal law says: "A retroactive statute would partake in its character of the mischiefs of an *ex post facto* law as to all cases of crimes and penalties, and in matters relating to contracts or property, would violate every sound principle."\*

Retroactivity is manifestly a principle which cannot be recognized by a sound national policy, and it is to be hoped that the nations invited by the high contracting parties to recognize the three rules of neutrality will protest energetically against a precedent without example and without a name.

For the same reason, the recognition of the second rule cannot fail to precipitate a conflict between Prussia on the one hand and Great Britain and the United States on the other, on account of the supply, by the latter powers, of arms and military stores to France during the late war. Prussia, at the time, protested against such a practice, as being in flagrant violation of the laws of neutrality. Does not the Treaty of Washington necessarily involve an acknowledgement that Prussia was in the right? It says: "A neutral government is bound not to permit or suffer either belligerent to make use of its ports or waters for the purpose of the renewal or augmentation of military supplies or arms or the recruitment of men." The high contracting parties agree to observe these rules in future and to bring them to the knowledge of other maritime powers and invite them to accede to them. There can be no doubt that Germany will not only hasten to recognize these rules for the future, but will likewise invoke them with regard to the past, by representing to the high contracting parties that if the supplying of arms is under the circumstances recited, contrary to public international law in 1871, it must have been equally so in 1870, the rule being based not upon international agreements but upon reason and justice. So true is it that these rules of neutrality form part of the natural law that they have at all times been laid down by many text writers. Without desiring to make an extensive study of the point—which would lead us away from the subject of our article—we may cite Vattel. The first duty of a neutral state, he says is "to give no assistance when there is no obligation to give it, nor voluntarily to furnish troops, arms, ammunition, or anything of direct use in war." † Bynkershoek ‡ said before Vattel, that

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\* Dwarris on Statutes, vol. ii, p. 540.

† Liv. III, ch. 7, § 104.

‡ *Quæstiones juris publici*, I. 9.



"the enemies of our friends are to be considered in a twofold light, as our friends and our friends' enemies. If you consider them as friends, we may rightly aid and counsel them and may supply them with auxiliary troops, arms and other things which war has need of. But as far as they are our friends' enemies, it is not permitted to us to do this, for thus we should prefer one to the other in war, which equality in friendship—a thing to be specially aimed at—forbids."\* Barbeyrac in his notes on Pufendorf (1712) expresses himself in nearly the same words.† "L'histoire de l'Europe" said Azuni in 1801, "fournit néanmoins des exemples de puissances, qui malgré leur neutralité déclarée n'ont pas cessé de fournir des troupes, des recrues, de l'argent, des munitions de guerre, et des approvisionnements de toute nature, propre à accroître la force d'un des belligérans. Ces exemples cependant ne sont considérés que comme de vrais abus des droits de la neutralité, pratiqués par des nations qui se croient sûres de n'être point attaquées, pour raison des secours qu'on en tirait, soit à cause de leur situation avantageuse, soit à cause des garanties données et des complications de droits d'autres souverains, qui empêchaient qu'on ne les attaquât; c'est ainsi qu'on a vu souvent des nations rester exemptes du fléau de la guerre, quoiqu'elles n'eussent fait aucun traité spécial pour s'en garantir."‡

Finally the pretension of Great Britain that she was justified by international law in recognizing the South as a belligerent on the sea as well as on land, (a pretension which all publicists and among others Bluntschli have regarded as well founded,) has not been admitted. If we are to judge by the 36th protocol, it does not appear that this point was submitted to the attention of the Joint High Commission. This omission was the more important, that it may be doubted whether, under the Articles 6 and 7 declaring that the arbitrators shall be governed by the three rules "and by such principles of international law as are not inconsistent therewith," the United States cannot argue anew that Great Britain (independently of her duties as defined by the three rules) is responsible for her recognition of the South as a belligerent "in an unprecedented and precipitate manner."

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\* See also Massé, Dr. Com. p. 145, 228.

† Le Dr. de la Nature, vol. 2, p. 461, n. 2.

‡ Dr. Mar., vol. 2, p. 46.

## II.—THE FENIAN CLAIMS.

In closing our remarks on the recognition of the principles involved in the settlement of the Alabama claims, we cannot forbear expressing our surprise to see the Fenian question set aside without any resistance or serious remonstrance on the part of the British Commissioners. The Fenian claims have been officially presented by the Government of the Dominion to the Imperial Government. Of this there are abundant proofs, and a very recent one is to be found in the report of the Hon. A. Campbell's mission to London, dated 10th September, 1870. The following summary of his interviews with Lord Kimberley, *concerning the Fenian invasions and the troubles caused by them*, will, we are sure, be perused with interest:—

“Upon this subject I pointed out the troubles and losses which, during a number of years, had been caused to Her Majesty's subjects in Canada, by the Fenian marauders; that these men were American citizens, many of them not even Irish by descent; that they were enlisted, armed, and drilled in the large cities of the Union, under the orders of a Fenian Congress and Executive assuming the pretensions of a Government, the drilling occasionally even taking place in company with militia corps, under officers believed to hold commissions under the Government of the United States, the United States journals of the day giving the fullest publicity to everything which was being done. I described the Fenian invasions and repulse in 1866, and referred to the representations and the claim for indemnity made by Sir George Cartier and Mr. Macdougall on behalf of Canada to Her Majesty's Government with reference to the losses thereby caused, which were stated in a memorandum furnished to the Colonial Office by those gentlemen as amounting to several millions. I referred to the several alarms which had taken place since 1866, all attended with more or less injury to the country, and with more or less expenditure, and said that early in the present year the threatened invasion and the actual one had injured the country very much; that the loss with regard to industrial pursuits it would be difficult to estimate, and there had been a large expenditure in sending forward volunteers to meet the invading forces. The number of men sent out was about 6,000 in April, and in May about 12,000—these numbers would be equivalent to calling out 60,000 and 120,000 in England. In answer to an inquiry by Lord Kimberley I said that I could not state the actual military expenditure with any accuracy, but that up to the time I left Canada it was supposed to be somewhere between five hundred and eight hundred thousand dollars, and that whatever it was, it formed but a small portion of the loss sustained by the country. We thought a very strong case might be

made out for a demand for indemnity from the United States. Messrs. Cartier and Macdougall had asked that such a demand should be made with reference to the loss sustained in 1866, and we considered that we were entitled to ask for indemnity in reference to all the expenditure that had been since caused to us by the Fenians. Failing the obtaining of such an indemnity from the United States, we thought the Empire should join with Canada in meeting the losses; the Fenian difficulties were not of our creating, but grew out of real or imaginary wrongs that the Empire had in the past inflicted on Ireland, and we were fighting battles which were not ours but those of the Empire. We were quite ready, as a portion of the Empire, to bear our share of these or any other troubles in which the country might be involved, but it was not fair that we should be allowed to suffer alone all the losses and consequences of the Imperial acts or policy which were complained of, and I strongly urged that for the past and the future, should any further Fenian troubles arise, the Empire, as a whole, should bear the burden of resisting such attacks, and that Canada should only contribute as a portion of the Empire. Lord Kimberley suggested that the present generation of Canadians were as responsible for the alleged wrongs of Ireland as the present generation of the fellow subjects residing in Great Britain. Admitting this, I urged that the fair conclusion was that all alike, and not Canadians alone, should bear the losses and consequences of the course which had been in the past followed towards Ireland. His Lordship said it was impossible for him to dispose of the question, and he took for granted that I did not anticipate he would, but he would consider it himself and obtain early consideration of it by his colleagues, letting the Canadian Government know what view was taken."

That under these circumstances the Government of Canada has a right according to the rules of international law to an indemnity, it is needless to discuss.

Vattel said, nearly a century ago: "The nation or the sovereign ought not to suffer the citizens to do an injury to the subjects of another State, much less to offend that State itself."\* This is, in fact, the rule of the Roman law above cited, which has passed not only into international law but also into the municipal laws of all civilized nations. It is, finally, the same principle which has been sanctioned by the three rules of the 6th article of the Treaty of Washington, with the single difference that with reference to the Fenian Question its application is extended to operations by land.

This general principle has further been formally recognized as

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\* Vol. 2, p. 165.

applying to hostile raids organized upon the soil of a neutral state. "A neutral State" says Rolin Jacquemyns,\* "ought to abstain from favouring or tolerating—1st. The organization upon its territory of any band recruited for purposes of aggression against a foreign State. 2nd. The fitting out in its ports of armed vessels intended to aid in any manner whatsoever any attempt at insurrection in the possessions of a foreign sovereign.

"These rules are not new; they are but the application of the immutable principle of justice that neutrality so long as it exists must be really and seriously enforced. But this is the first time that they have been formally proclaimed,† besides, it should be noticed with respect to the first rule, that it makes a distinction between "bands recruited" for purposes of aggression and persons who engage *individually* in an insurrection. The neutral State, it is plain, cannot be held responsible for the deeds of individuals whose liberty of action has escaped from her control; but the enlisting and assembling of troops, on the contrary, are marks of the exercise of sovereign power, and are suppressed by the laws of every State on whose soil and territory they are made. The State which does not put a stop to them becomes responsible. (V. Bluntschli, *das moderne Völkerrecht*, §§ 751 and 758.)"

Bluntschli, in his *Opinion Impartiale sur la Question de l'Alabama*, says:‡ "Nor can any State, in time of peace, permit hostile operations to be organized on her territory against a friendly State. Every State is bound to see that its territory does not become a base of operations for military enterprises directed against States with whom it is at peace. These universal international principles," adds the learned publicist, "are consecrated by the municipal law of England and America." The latter remark is so true that the Fenian General O'Neil and other chiefs of that organization were last year tried and condemned to imprisonment in the Sing Sing State Prison, for violation of the municipal neutrality laws of the United States in connection with the Fenian Raid of the preceding spring. But it cannot be pretended that such a punishment constitutes the totality of the penalty required by international law for such an open violation of neutrality.

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\* *Revue de Dr. Int.*, vol. i, p. 447.

† It was in 1869, by the Paris Conference, to settle the Greco-Turkish difficulty.

‡ *Revue de Dr. Int.*, vol. ii, p. 452-485; *Revue Critique*, p. 20.

Finally, the principle from which we deduce the liability of the United States to make good the damage caused by acts of that kind is so plain that it was invoked by the American Government against the Canadian Government in the course of the civil war in the matter of the Confederate raids made into American territory from Canada. To be brief, we will cite only Major-General Dix's despatch (25th November, 1864) forwarded to the Government of Canada through the hands of the British Minister at Washington, which says: "Should not the Government of Canada be required through the medium of the British Minister to prevent by armed force the organization on British soil of marauding expeditions designed to pillage our frontier towns, which constitutes a violation of all the principles of international law." \*

Returning to the negotiations of the Joint High Commissioners What have they decided with regard to the Fenian Claims? The following is the text of the official report:

"At the Conference on the 14th of April the Joint High Commission took into consideration the subject mentioned by Sir Edward Thornton in that letter. The British Commissioners proposed that a Commission for the consideration of these claims should be appointed, and that the Convention of 1863 should be followed as a precedent. This was agreed to, except that it was settled that there should be a third Commissioner instead of an umpire. At the Conference on the 15th of April the treaty articles, twelve to seventeen, were agreed to. At the Conference on the 26th of April the British Commissioners again brought before the Joint High Commission the claims of the people of Canada for injuries suffered from the Fenian raids. They said that they were instructed to present these claims and to state that they were regarded by Her Majesty's Government as coming within the class of subjects indicated by Sir Edward Thornton, in his letter of January 26, as subjects for the consideration of the Joint High Commission.

"The American Commissioners replied that they were instructed to say that the Government of the United States did not regard these claims as coming within the class of subjects indicated in that letter as subjects for the consideration of the Joint High Commission, and that they were without any authority from their Government to consider them. They, therefore, declined to do so. The British Commissioners replied that as the subject was understood not to be within the scope of the instructions of the American Commissioners, they must refer to their Government for further instructions upon it.

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\* Documents relating to the Southern Rebel Raids. Printed by order of the Canadian Parliament (1869) p. 35. See also Message of President Van Buren towards the end of 1838.

"At the Conference on the 3rd of May the British Commissioners stated that they were instructed by their Government to express their regret that the American Commissioners were without authority to deal with the question of the Fenian raids, and they enquired whether that was still the case. The American Commissioners replied that they could see no reason to vary the reply formerly given to this proposal; that in their view the subject was not embraced in the scope of the correspondence between Sir Edward Thornton and Mr. Fish, under either of the letters of the former, and that they did not feel justified in entering upon the consideration of any class of claims not contemplated at the time of the creation of the present Commission, and that the claims now referred to did not commend themselves to their favour.

"The British High Commissioners said that under the circumstances they would not urge further that the settlement of the claims should be included in the present Treaty, and that they had the less difficulty in doing so, as a portion of the claims were of a constructive and inferential character."

It must be admitted that such a mode of dealing is far from creditable to our neighbours of the Republic. Their Commissioners urge that they have no authority from their Government to consider the Fenian Claims. But if it had been intended to give us justice, nothing was easier for them than to ask further powers and instructions from the Washington authorities, under whose eyes the Commission was sitting. And lastly, did not the British and American Commissioners agree at their very first conference that the discussion might include such matters as would be mutually agreed upon? The conduct of the American Commissioners has been most unfair in this respect. But what is more astonishing is to see the British Commissioners declare that they had the less difficulty in yielding to this cavalier refusal as a portion of the claims were of a "constructive and inferential character." The British Commissioners had the less excuse for giving way, since the lawless acts of which we complain were not caused by any fault of the people of Canada, but by the wrongs—to-day acknowledged and partly remedied—inflicted by England upon Ireland.

We may here remark that as the Treaty covers only the claims which arose during and by reason of the American civil war, it does not debar the British Government from pressing, at any future time, the Fenian Claims which arose at a subsequent period.

## III.—THE FISHERY QUESTION.

Under the Treaty of 1818, which governs the relations of American citizens to the Fisheries of the British North American Provinces since the abrogation of the Reciprocity Treaty, Canada has constantly contended that the prescribed limit of three marine miles as the line of exclusion, should be measured from headland to headland. The United States Government contended that it should be measured from the interior of the bays and sinuosities of the coast. In support of the Canadian view, appeal was confidently made as well to the precise language of the Convention as to the established principles of international law.\*

It does not appear that the headland dispute was considered by the Joint High Commissioners in its relation to international law and the Convention of 1818. This omission is the more to be deplored, because if the Treaty be not ratified, and at all events when it is abrogated, the long pending and vexatious controversies which the Commission should have settled, will again break out and form an additional element of exasperation.

At the opening of the negotiations, the British Commissioners suggested that these differences should be merged in a liberal and judicious trade arrangement, but the American Commissioners peremptorily refused to hear of such a proposition; and finally a compromise was effected, in terms so unfair and unreciprocal (say the Canadians) that it assumes the character of a free gift or abandonment of our Fisheries. But not to prejudice the reader's mind, let us first lay before him the official report of the deliberations, and their ultimate result in the text of the Treaty.

The 36th protocol says:

"At the Conference on the 6th of March, the British Commissioners stated that they were prepared to discuss the question of the Fisheries, either in detail or generally, so as either to enter into an examination of the respective rights of the two countries under the Treaty of 1818 and the general law of nations, or to approach at once the settlement of the question on a comprehensive basis.

"The American Commissioners said that with the view of avoiding the discussion of matters which subsequent negotiation might render it unnecessary to enter into, they thought it would be preferable to adopt the latter course, and inquired what in that case would be the basis which the British Commissioners desired to propose.

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\* See *supra* pp. 36-68, where the question is discussed at length.

"The British Commissioners replied that they considered that the Reciprocity Treaty of June 5, 1854, should be restored in principle.

"The American Commissioners declined to assent to a renewal of the former Reciprocity Treaty.

"The British Commissioners then suggested, that if any considerable modification were made in the tariff arrangement of that trade, the coasting trade of the United States and of her Britannic Majesty's possessions in North America should be reciprocally thrown open, and that the navigation of the river St. Lawrence and of the Canadian canals should be also thrown open to the citizens of the United States on terms of equality with British subjects.

"The American Commissioners declined this proposal, and objected to a negotiation on the basis of the Reciprocity Treaty. They said that that treaty had proved unsatisfactory to the people of the United States, and consequently had been terminated by notice from the government of the United States, in pursuance of its provisions. Its renewal was not in their interest, and would not be in accordance with the sentiments of their people. They further said that they were not at liberty to treat of the opening of the coasting trade of the United States to the subjects of Her Majesty residing in her possessions in North America.

"It was agreed that the question relating to navigation of the River St. Lawrence, and of Canadian canals, and to other commercial questions affecting Canada, should be treated by themselves. The subject of the Fisheries was further discussed at the Conference on the 17th, 20th, 22nd and 25th of March. The American Commissioners stated that if a value of the inshore fisheries could be ascertained, the United States might prefer to purchase for a sum of money the right to enjoy in perpetuity the use of these inshore fisheries in common with British fishermen, and mentioned one million dollars as the sum they were prepared to offer.

"The British Commissioners replied that this offer was, they thought, wholly inadequate, and that no arrangement would be acceptable of which the admission into the United States free of duty of fish the produce of the British fisheries did not form a part, adding that any arrangement for the acquisition by purchase of the inshore fisheries in perpetuity was open to grave objections.

"The American Commissioners inquired whether it would be necessary to refer any arrangement for purchase to the Colonial or Provincial Parliament.

"The British Commissioners explained that the fisheries, within the limits of maritime jurisdiction, were the property of the several British colonies, and it would be necessary to refer any arrangement which might affect colonial property or rights to the Colonial or Provincial Parliaments, and that legislation would also be required in the Imperial Parliament. During these discussions the British Commissioners contended that these inshore fisheries were of great value,



and that the most satisfactory arrangement for their use would be a reciprocal tariff arrangement and reciprocity in the coasting trade.

"The American Commissioners replied that their value was overestimated; that the United States desired to secure their enjoyment, not for their commercial or intrinsic value, but for the purpose of removing a source of irritation, and that they could hold out no hope that the Congress of the United States would give its assent to such a tariff arrangement as was proposed, or to any extended plan of reciprocal free admission of the products of the two countries; but that inasmuch as one branch of Congress had recently more than once expressed itself in favour of the abolition of duties on coal and salt, they would propose that coal, salt and fish be reciprocally admitted free, and that inasmuch as Congress had removed the duty from a portion of the lumber heretofore subject to duty, and the tendency of legislation in the United States was towards the reduction of taxation of duties in proportion to the reduction of the public debt and expenses, they would further propose that timber be admitted free from duty, from and after the 1st of July, 1874, subject to the approval of Congress, which was necessary on questions affecting import duties.

"The British Commissioners at the conference on the 17th of April stated that they had referred this offer to their government and were instructed to inform the American Commissioners that it was regarded as inadequate, and that her Majesty's government considered that free lumber should be granted at once, and that the proposed tariff concessions should be supplemented by a money payment.

The American Commissioners then stated that they withdrew the proposal which they had previously made of the reciprocal free admission of coal, salt and fish, and of lumber, after July 1, 1874; that that proposal had been made entirely in the interest of peaceful settlement, and for the purpose of removing a source of irritation and anxiety; that its value had been beyond the commercial or intrinsic value of the rights to have been acquired in return, and that they could not consent to an arrangement on the basis now proposed by the British Commissioners, and they renewed their proposal to pay a money equivalent for the use of the inshore fisheries. They further proposed that in case the two governments should not be able to agree upon the sum to be paid as such an equivalent, the matter should be referred to an impartial Commission for determination.

"The British Commissioners replied that this proposal was one on which they had no instructions, and that it would not be possible for them to come to any arrangement, except one for a term of years and involving the concession of free fish and fish oil by the American Commissioners; but that if free fish and fish oil were conceded they would inquire of their government whether they were prepared to assent to a reference to arbitration as to money payment.

"The American Commissioners replied that they were willing, subject to the action of Congress, to concede free fish and fish oil as an

equivalent for the use of the inshore fisheries, and to make the arrangements for a term of years; that they were of opinion that free fish and fish oil would be more than an equivalent for these fisheries, but that they were also willing to agree to a reference to determine that question and the amount of any money payment that might be found necessary to complete an equivalent. It being understood that legislation would be needed before any payment could be made.

"The subject was further discussed in the conferences of April 18 and 19, and the British Commissioners, having referred the last proposal to their government, and received instructions to accept it, the treaty articles 18 to 25 were agreed to at the conference on the 22nd of April."

ART. 18. It is agreed by the high contracting parties that, in addition to the liberty secured to the United States fishermen by the Convention between the United States and Great Britain, signed at London on the 20th day of October, 1818, of taking, curing and drying fish on certain coasts of the British North-American Colonies, therein defined, the inhabitants of the United States shall have in common with the subjects of Her Britannic Majesty, the liberty, for the term of years mentioned in Article 33 of this Treaty, to take fish of every kind, except shell-fish, on the sea coasts and shores and in the bays, harbours, and creeks, of the Provinces of Quebec, Nova Scotia and New Brunswick, and the colony of Prince Edward's Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the said coast, and shores, and islands, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish. *Provided*, That in so doing they do not interfere with the rights of private property, or with the British fishermen in the peaceable use of any part of the said coasts in their occupancy for the same purpose. It is understood that the above mentioned liberty applies solely to the sea fishery, and that the salmon and shad fisheries, and all other fisheries in rivers and the mouths of rivers, are hereby reserved exclusively for British fishermen.

Article 19 is a repetition verbatim of the foregoing one with this difference that it gives to British subjects the liberty to fish in common with the citizens of the United States on the eastern sea coasts and shores of the United States north of the 39th parallel of north latitude, subject to the same restrictions as are contained in Article 18 with regard to the liberty of fishing on our coasts.

Article 20 declares that the mode of designating the places reserved from the common right of sea-fishing shall be the same as indicated in the Reciprocity Treaty (Art. 1st.)

ART. 21. It is agreed that for the term of years mentioned in Article 33 of this Treaty, fish oil and fish of all kinds, except fish of the inland lakes and of the rivers falling into them, and except fish preserved in oil, being the produce of the fisheries of the United States or of the Dominion of Canada, or of Prince Edward's Island, shall be admitted into each country respectively free of duty.

ART. 22. Inasmuch as it is asserted by the Government of Her Britannic Majesty that the privileges accorded to the citizens of the United States, under Article 18 of this Treaty, are of greater value than those accorded by Articles 19 and 21 of this Treaty to the subjects of Her Britannic Majesty, and this assertion is not admitted by the Government of the United States, it is further agreed that Commissioners shall be appointed to determine, having regard to the privileges accorded by the United States to the subjects of Her Britannic Majesty as stated in Articles 19 and 21 of this Treaty, the amount of any compensation which, in their opinion, ought to be paid by the Government of the United States to the Government of Her Britannic Majesty, in return for the privileges accorded to the citizens of the United States and Article 18 of this Treaty; that any sum of money which the said Commissioners may so award shall be paid by the United States Government in a gross sum within twelve months after such award shall have been given.

ART. 23. The Commissioners referred to in the preceding Article shall be appointed in the following manner, that is to say:—One Commissioner shall be named by the President of the United States, one by Her Britannic Majesty, and a third by the President and Her Britannic Majesty conjointly; and in case the third Commissioner shall not have been so named within a period of three months from the date when this Act shall take effect, then the third Commissioner shall be named by the Representative at London of His Majesty the Emperor of Austria and King of Hungary. In case of the death, absence, or incapacity of any Commissioner, or in the event of any Commissioner omitting or ceasing to act, the vacancy shall be filled in the manner herein before provided for, making the original appointment, the period of three months in case of each substitution being calculated from the date of the happening of the vacancy. The Commissioners named shall meet in the city of Halifax, in the Province of Nova Scotia, at the earliest convenient period after they have been respectively named, and shall, before proceeding to any business, make and subscribe a solemn declaration that they will impartially and carefully examine and decide the matters referred to them to the best of their judgment and according to justice and equity, and such declaration shall be entered on the record of their proceedings. Each of the high contracting powers shall also name one person to attend the Commission as his agent to represent it generally in all matters connected with the Commission.

ART. 32. It is further agreed that the provisions and stipulations of

Articles 18 to 25 of this Treaty, inclusive, shall extend to the Colony of Newfoundland, so far as they are applicable. But if the Imperial Parliament, the Legislature of Newfoundland, or the Congress of the United States shall not embrace the Colony of Newfoundland in their laws enacted for carrying the foregoing Articles into effect, then this Article shall be of no effect; but the omission to make provision by law, to give it effect, by either of the legislative bodies aforesaid, shall not in any way impair any other articles of this Treaty.

ART. 33. The foregoing articles, 18 to 25, inclusive, and Article 30 of this Treaty, shall take effect as soon as the laws required to carry them into operation shall have been passed by the Imperial Parliament of Great Britain, by the Parliament of Canada, and by the Legislature of Prince Edward's Island, on the one hand, and by the Congress of the United States on the other. Such assent having been given, the said articles shall remain in force for the period of ten years, the date at which they may cease to operate, and further, until the expiration of two years after either of the high contracting parties shall have given notice to the other of its wish to terminate the same; each of the high contracting parties being at liberty to give such notice to the other at the end of the said period of ten years or at any time afterward.

We may remark that the Treaty rejects the principle of international law upheld by the United States Government since many years, namely, that the Convention of 1818 had been swallowed up and ended by the Reciprocity Treaty of 1854 and that the only compact in force between Great Britain and the United States was Article 3 of the Treaty of 1783.\*

Article 18, in fact, contains by way of recital the words "in addition to the liberty of fishing secured to the United States fishermen by the Convention between the United States and Great Britain, signed at London on the 20th day of October, 1818, of taking, curing and drying fish on certain coasts of the British North American Colonies therein defined," and thereby recognises in the most unqualified and positive manner, that the Convention of 1818 is still in force, and will continue to be in force concurrently with the Treaty of Washington. And, therefore, the estimation of the value of fisheries on the coasts of Labrador and Newfoundland, cannot be taken into consideration by the arbitration tribunal.

It is not unimportant to take note of this formal admission on the part of the United States; for it will not be without weight,

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\* American Law Review, April, 1871; Dana on Wheaton, § 274, p. 350.

whether the Treaty be ratified or rejected, when—and that at no distant day—American legists will repeat with redoubled zeal and assurance the arguments of the *American Law Review* and of Dana in his *Notes on Wheaton's International Law*.

A more delicate point is, whether the cession of the Fisheries disposes of the headland dispute. This question is one of great practical importance: for in order to determine the value of our Fisheries within the meaning of Article 22, an understanding must be arrived at as to their extent; as to whether they do or do not stretch out three miles off the coasts and bays, from a line measured from headland to headland. An opinion entertained pretty generally by the Canadian press, and which is partaken by more than one distinguished member of the legal profession is, that the question has not been settled. Mr. Blake, a well-known lawyer and politician of Ontario, has asserted, perhaps in a moment of thoughtlessness,\* that the question as to "the legal claim to the three mile limit from headland to headland, had not been settled by the Commission. There was no declaration in the Treaty as to what were the rights of the United States. So that in fact they had determined to sell the Fisheries without determining first what they had to sell."

In our humble opinion, the question is not to know whether the headland dispute has been settled by the Treaty, according to the true principles of international law; it is to know what is the extent of the concession which Great Britain makes to the United States by Article 18; and assuredly there cannot be two opinions on this point. First, the sole right alleged by the United States in Article 18, is their actually existing and undisputed right of fishing on certain portions of the coast indicated by the Convention of 1818. That Convention does not contain a syllable concerning the right of fishing inside the limit of three miles from the bays and windings of the coast without regard to headlands. Secondly, Article 18 grants to them "liberty to fish on the sea-coasts and shores, and in the bays, harbours and creeks of the Provinces, without being restricted to any distance from the shore." Such is the extent of the privilege which is accorded to the United States fishermen by the Treaty, and it must be admitted that it could not be more clearly defined. This definition

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\* In a speech at a Reform dinner some days after the publication of the Treaty. (*Montreal Gazette*, 23rd May, 1871.)

comprises the privilege of fishing within three miles of the bays, from headland to headland; and as it is this grant the value of which must be estimated under Article 22 and 23, the arbitrators must necessarily value our Fisheries according to that definition. Thirdly, Article 22 declares that the arbitrator shall make an estimation not of the Fisheries of the Dominion of Canada, but of the value of the privileges accorded to the citizens of the United States under Article 18 of this Treaty, "having regard to the privileges accorded by the United States to the subjects of Her Britannic Majesty as stated in Articles 19 and 21." This language is so precise as to render all comment unnecessary.

This latter Article (21) declares "that fish oil and fish of all kinds, *being the produce of the Fisheries of the United States or of the Dominion of Canada* shall be admitted into each country respectively *free of duty*."

It has been asked whether fish taken by Canadian fishermen outside the Dominion fishing-grounds in the open sea or on the United States fishing grounds can enter into the United States free of duty.

In our humble opinion, there can be no doubt that fish caught in the open sea is not free of duty; for the Article declares distinctly that it is only fish *being the produce of the fisheries of the United States or of the Dominion of Canada* which shall so enter free of duty.

Does the same remark hold good of the fish caught in American waters? It would at first perusal seem that the wording of the Article authorises the admittance free of fish being the produce of the fisheries of the two countries. Still the disjunctive *or* instead of the conjunctive *and* ("the produce of the United States *or* of the Dominion") followed by the words "shall be admitted into *each* country (instead of both countries) **RESPECTIVELY**," seems to reject such an interpretation. Besides it is a general principle in matters of tariff that duties as well as exemption from duties applies only to foreign produce, and further, the expression "admitted" conveys the same idea, that of importation, for in a legal sense a State cannot be understood to admit the products of her own territory since they already form part thereof.

Such was also the conclusion at which the United States arrived under the Reciprocity Treaty. Article 2 of that Treaty gave "to British subjects the liberty to fish on the eastern coasts

of the United States north of the 36 parallel of North latitude." Article 3 declared: "It is agreed that the Articles enumerated in the schedule hereunto annexed, (among which were fish of all kinds, products of fish and of all the creatures living in the water) being the growth and produce of the aforesaid British Colonies or of the United States, shall be admitted into each country respectively, free of duty."

The following is the interpretation given by the Washington authorities to the latter Article:

"On an application," says Andrews,\* "for the free admission of certain products of the British North American Provinces, imported into the United States from Havana and London, the Revenue Department decided that they could not be so admitted and that the Articles, *if of the production of the North American British Provinces* and designated as free in the Treaty, would be entitled to the privilege of free entry only when imported directly from those Provinces into the United States." Thus under the Reciprocity Treaty, fish caught by British subjects in American waters, were not free of duty when brought into the United States market. This fact is worthy of attention.

The Treaty of Washington with respect to the Fisheries requires ratification by the Imperial Parliament, the Parliament of Canada, the Parliament of Prince Edward Island and the Congress of the United States.

During the progress of the deliberations of the Commission fears were expressed by the press that the consent of the Parliaments was not necessary to the validity of the Treaty. The *Revue Critique* endeavoured in its last number to show that no surrender of our fisheries could be made without the consent of the Dominion Parliament, and our reasoning has since been confirmed by the decision of the Commissioners.

A refusal by any one of the above mentioned Legislatures to ratify the Treaty renders Articles 18 to 25 null and of no effect. In that case the Fisheries will be thrown back to their present unsettled condition, but the other provisions of the Treaty relating to the Alabama Claims, St. Lawrence Navigation and San Juan Questions, which require only to be ratified by the Queen and by the President upon the advice of the Senate, will come into full force and will have full effect from the day that the ratifications are exchanged.†

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\* Practical Treatise on the Revenue Laws, 1858, p. 309, p. 362.

† The ratification was voted by the Senate on the 24th of May, 1871.

Apprehensions have been expressed that such will not be the only result of the rejection of the Treaty as far as it relates to the Fisheries. It has been asserted that the Treaty of Washington, being a compact, could not be accepted in part. These apprehensions are unfounded.

1st. The Treaty is not a compact or contract, but a compound of several contracts distinct in their nature and objects.

2nd. The stipulation regarding Canada are not of a permanent nature, while the others are.

3rd. Article 33 provides expressly that the stipulations concerning Canada will not take effect unless ratified by its Parliament, meaning thereby that the rest of the Treaty will take effect without this ratification.

4th. Article 43 declares positively that the *Private Treaty*, that is that portion of the Treaty which is in the power of the British Crown and the President and Senate of the United States, such as the Alabama Claims and Boundary Line sections, will come into force from the date of the exchange of ratifications.\*

5th. Articles 1, 3, 12 and 36 show that the San Juan Question and other matters foreign to Canada may be finally settled before the Canadian Parliament meets.

The question finally arises, whether the notice required by Article 33 in order to terminate the Treaty can be given at the expiration of the ten years, or at any time subsequently, by the Dominion Government. An answer in the negative is inevitable, for Canada being a dependency of Great Britain and not being one of the contracting parties within the meaning of the Article and of international law, cannot exercise any external act of sovereignty so long as she continue in that state.

We wish to add a remark respecting the principle which has served as a basis for the settlement of the Fishery Question. It is a maxim recognized and consecrated by the uniform usage of nations that commercial advantages should never be granted by one State to another for a pecuniary consideration; that they should be granted only in consideration of a trade equivalent, and in this respect the surrender of the Fisheries is unprecedented and anti-national. To-day we have granted a privilege, to-morrow the ownership may be demanded of us. Armed with the

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\* Exchange of ratifications was made in London on the 17th June.



doctrine that territorial rights can be acquired for money, where will our neighbours stop? We beseech our statesmen to reflect upon the consequences before they concede the principle which has already bartered away one of our chief national resources.

The importance of our Fisheries is so considerable that it has at all times attracted the attention of our own statesmen and of foreign nations. Admiral Saunders, a member of the British House of Commons, expressed himself as follows, at a period as far back as the year 1774 (while the Quebec Act of that year was under discussion): "If you give up this (the fishery,) I am afraid you will loose your breed of seamen, and I know no way that this country has of breeding seamen but two; one the fishery, and the other the coasting trade. All other trade is at the expense of men, and whatever hurts your fishery must reduce the naval force of this Country. Sir, the fishery is worth more to you than all the possessions you have put together. Without that fishery your possessions are not safe; nor are you safe in your own country. Instead of doing anything to hurt your fishery, new methods should be taken to rear more seamen. God knows how much you'll find the want of seamen whenever this country finds it necessary to equip its fleets!"\*

The Admiral's foresight has been amply justified by the events. It is undoubtedly to her Fisheries that Canada owes the vast progress which she has made in maritime commerce and which has made her merchant fleet the fourth in the world.

From an industrial point of view the material value of the coast and inshore fisheries can scarcely be over-estimated. The Honourable Minister of Marine and Fisheries, on his mission to the Imperial Government in 1870, said to Lord Kimberley: "We possess the whole herring and mackerel fisheries on the Western side of the Atlantic, the Americans having no inshore fisheries of any great value."† The Honourable gentleman says further in his annual report for 1870, that "the aggregate value of the fish products of the Provincial Fisheries is nearly \$17,000,000, and is susceptible of being increased to a very much greater value."‡ In another place he says that "the annual increase of yield and

\* Debates on the Canada Bill in 1774, by Sir H. Cavendish, p. 197.

† Correspondence between Government of Dominion, and the Imperial Government, on the subject of the fishery, p. 42.

‡ Annual Report of the Department of Marine and Fisheries, Ottawa, 1871, p. 70.

enhanced value of the produce from our Fisheries show how rapid and extensive has been their development. Without reckoning at all the catch by foreigners, the annual value for exportation of the produce of our waters in the Confederate Provinces now exceeds \$7,000,000, nearly doubling in ten years."\* Elsewhere he observes: "There is no country in the world possessing finer Fisheries than British North America. As a national possession they are inestimable, and as a field for industry and enterprise they are inexhaustible."†

It is asserted by the American Commissioners that *the value of the inshore fisheries is over-estimated; that the United States desires to secure their enjoyment, not for their commercial or intrinsic value, but for the purpose of removing a source of irritation.* (See Protocol 36 and also Art. 22 of the Treaty.) Nothing is more contrary to good faith than such a statement. Here is what our neighbours thought of the Fisheries at a time when they were far from being so flourishing as they are to-day. In 1814 the Treaty of Ghent was negotiated between Great Britain and the United States,—MM. Adams, Bayard, Clay, Russell and Gallatin acting on behalf of the United States. By this Treaty the privilege of fishing on the Provincial coasts granted to American citizens by the Treaty of 1783, was not continued to them, Mr. Russell being decidedly of opinion that it was worthless. In 1822 this opinion was strongly disapproved in the press and in the House of Representatives of the United States; and Mr. Adams (one of the Commissioners, and afterwards President of the United States) undertook to show, on behalf of the majority of his colleagues, that it was unfounded. The following are extracts from his able plea:

"Of all the errors in Mr. Russell's letter of 11th February, 1815, to the Secretary of State, there is none more extraordinary in its character, or more pernicious in its tendency, than the disparaging estimate which he holds forth of the *value* of the liberties in the fisheries, secured by the Treaty of 1783, and, as he would maintain, extinguished, by the war of 1812. Not satisfied with maintaining in the face of his own signatures at Ghent, the doctrine that all right to them had been irredeemably extinguished by the war; not contented with the devotion of all his learning and all his ingenuity, to take from his country the last and only support of right upon which this great interest had,

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\* Annual Report of the Department of Marine and Fisheries, (Ottawa, 1871, p. 62.)

† Ibid, p. 69.

by himself and his colleagues, been left at the conclusion of the peace to depend; not ashamed of urging the total abandonment of a claim, at that very time in litigation, and of which he was himself one of the official defenders, he has exhausted his powers, active and meditative, in the effort to depreciate the *value* of those possessions, which while committed to his charge, he was so surprisingly intent upon relinquishing forever."

"I have shown that the proposal actually made to the British plenipotentiaries was, by the admission of Mr. Russell himself, so worthless, that it was nothing that they could accept; as in fact it was not accepted by them. Let us now see what was the value of this fishery; this "doubtful accommodation of a few fishermen, annually decreasing in number."

"From the tables in Dr. Seybert's Statistical Annals, it will be seen that in the year 1807, there were upwards of seventy thousand tons of shipping employed in the *cod* fishery alone; and that in that and the four preceding years, the exports from the United States of the proceeds of the fisheries, averaged three millions of dollars a year. There was indeed a great diminution during the years subsequent to 1807, till the close of the war—certainly not voluntary, but occasioned by the state of our maritime relations with Europe, by our own restrictive system, and finally by the war. But no sooner was that terminated, than the fisheries revived, and in the year 1816, the year after Mr. Russell's letter was written, there were again upwards of sixty-eight thousand tons employed in the *cod* fishery alone. From Dr. Seybert's statements, it appears further, that in this occupation the average of seamen employed is of about one man to every seven tons of shipping, so that these vessels were navigated by ten thousand of the hardiest, most skilful, soberest, and best mariners in the world. "Every person (says Dr. Seybert) on board our fishing vessels, has an interest in common with his associates; their reward depends upon their industry and enterprise. Much caution is observed in the selection of the crews of our fishing vessels; it often happens that every individual is connected by blood and the strongest ties of friendship. Our fishermen are remarkable for their sobriety and good conduct, and they rank with the most skilful navigators."

"Of these ten thousand men, and of their wives and children, the *cod* fisheries, if I may be allowed the expression, were the daily bread—their property—their subsistence. To how many thousands more were the labours and the dangers of their lives subservient? Their game was not only food and raiment to themselves, but to millions of other human beings.

"There is something in the very occupation of fishermen, not only beneficent in itself but noble and exalted in the qualities of which it requires the habitual exercise. In common with the cultivators of the soil, their labours contribute to the subsistence of mankind, and they have the merit of continual exposure to danger, superadded to

that of unceasing toil. Industry, frugality, patience, perseverance, fortitude, intrepidity, souls inured to perpetual conflict with the elements, and bodies steeled with unremitting action, ever grappling with danger, and familiar with death: these are the properties to which the fisherman of the ocean is formed by the daily labours of his life. These are the properties for which he who knew what was in man, the Saviour of mankind, sought his first, and found his most faithful, ardent, and undaunted disciples among the fishermen of his country. In the deadliest rancours of national wars, the examples of latter ages have been frequent of exempting, by the common consent of the most exasperated enemies, fishermen from the operation of hostilities. In our treaties with Prussia, they are expressly included among the classes of men "*whose occupations are for the common subsistence and benefit of mankind,*" with a stipulation, that in the event of war between the parties, they shall be allowed to continue their employment without molestation. Nor is their devotion to their country less conspicuous than their usefulness to their kind. While the huntsman of the ocean, far from his native land, from his family, and his fire-side, pursues at the constant hazard of life, his game upon the bosom of the deep, the desire of his heart, is by the nature of his situation every intently turned towards his home, his children, and his country. To be lost to them gives their keenest edge to his fears, to return with the fruits of his labours to them is the object of all his hopes. By no men upon earth have these qualities and dispositions been more constantly exemplified than by the fishermen of New England. From the proceeds of their "perilous and hardy industry," the value of three millions of dollars a year, for five years preceding 1808, was added to the exports of the United States. This was so much of national wealth *created* by the fishery. With what branch of the whole body of our commerce was this interest unconnected? Into what artery or vein of our political body did it not circulate wholesome blood? To what sinew of our national arm did it not impart firmness and energy? We are told they were "*annually decreasing in number.*" Yes! they had lost their occupation by the war; and where were they during the war? They were upon the ocean and upon the lakes, fighting the battles of their country. Turn back to the records of your revolution—ask Samuel Tucker, himself one of the number; a living example of the character common to them all, what were the fishermen of New England, in the tug of war for Independence? Appeal to the heroes of *all* our naval wars—ask the vanquishers of Algiers and Tripoli—ask the redeemers of your citizens from the chains of servitude, and of your nation from the humiliation of annual tribute to the barbarians of Africa—call on the champions of our last struggles with Britain—ask Hull, and Bainbridge, ask Stewart, Porter, and Macdonough, what proportion of New England fishermen were the companions of their victories, and sealed the proudest of our triumphs with their blood; and *then* listen if you can

to be told that the *unoffending* citizens of the West were *not at all* benefitted by the fishing privilege, and that the few fishermen in a remote quarter were *entirely exempt from the danger*.

"But we are told also that "by far the greatest part of the fish taken by our fishermen before the present war, was caught in the open sea, or upon our own coasts, and cured on our own shores." This assertion is, like the rest, erroneous.

"The shore fishery is carried on in vessels of less than twenty tons burthen, the proportion of which, as appears by Seybert's Statistical Annals, is about one seventh of the whole. With regard to the comparative value of the Bank and Labrador fisheries, I subjoin hereto information collected from several persons, acquainted with them, as their statements themselves will show in their minutest details.—Adams on the Fisheries, pp. 202, 204–206.

Mr. Adams concludes by invoking the testimony of many American merchants of high standing and experience, and of many American and foreign journals.

And all these national, commercial and industrial advantages are to be exposed to the selfish and perhaps ruinous action of a host of foreign fishermen (for although apparently inexhaustible they need to be cultivated and carefully preserved); nay they are even to be bartered away to the citizens of a foreign country wholly on in part for a sum of money! And again, what will be the amount of the price paid? Will the arbitrators chosen to estimate the value of the concessions which we are to make, take into consideration merely the time during which these concessions are absolutely made, namely ten years? In case England never gives the required notice and the liberty of fishing is continued for an indefinite period, the United States will enjoy a lucrative privilege in exchange for a trifling equivalent. This fact shows that commercial advantages which, for reasons of public policy and self protection, cannot be granted in perpetuity, cannot be based upon pecuniary considerations, but solely upon mutual trade arrangements. If the arbitrators could, instead of a block sum, set down as compensation a certain annual instalment, payable so long as the part of the Treaty relating to the Fisheries shall remain in force, the injustice would be less glaring. But the Treaty, in declaring by Article 22 that the indemnity shall be paid within twelve months in a gross sum, has taken away from the Commissioners all choice in the matter.

But, says our neighbours, as regards reciprocity we give you in exchange more than we receive. We give you the liberty to

fish on our coasts north of the 39th parallel of north latitude, a concession which is nearly as valuable as yours; and secondly, we open our vast market to the products of your Fisheries.

As to the first of these privileges, it would appear from the Report of the Minister of Marine and Fisheries that "the United States inshore fisheries are too distant and too much deteriorated to be of the slightest value to us."\* It is certain that our fishermen have never interfered with them. And if they are as valuable as is pretended, why has the President complained so loudly of the exclusion of American fishermen from our coast fisheries? And granting them to be ever so valuable, of what use are they to us, seeing that the American market is closed to all fish caught there by our fishermen, and seeing further that we have in our own waters all the fish we need? The privilege to fish in United States waters is therefore illusory and exists only on the parchment on which it is written.

As to the second privilege—the right of selling in the United States market, free of duty, fish, the produce of our own fishing grounds—its value is very problematical. 1st. The Canadian fishermen are too remote from the American fishing grounds to be able to compete successfully with the American fishermen in their operations there, and if they should succeed so far, they will be met in the American ports by a duty from which their American rivals will be free. Even with regard to the produce of the Canadian inshore waters, our fishermen will be subjected to great annoyance and numberless inquiries into the proof of the fact that their fish is really the produce of the inshore waters, and not of the open sea or American waters; so that in many instances the claim of exemption may lead to seizure and confiscation and become the fruitful source of strife and mutual recrimination.

Will not the Canadian fishermen be crowded out by the American fishermen? Such a result is greatly to be feared; and in that event it will be found that we have made not only a gratuitous concession but also one positively disastrous to our fishermen.

The Minister of Marine in his report, dated 30th June, 1869, when the system of licenses to foreign fishermen was in operation, said: "The continued admission of foreign fishing vessels and fishermen to participate in our valuable coast Fisheries on paying a nominal license fee as authorised by the Act of last session of

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\* Marine Report, 1871, p. 75.

Parliament, has not operated satisfactorily; the payment of the fee being, in most cases, altogether evaded. American vessels have boldly entered into our bays, creeks and harbours, and have actually crowded out the native fishermen without any regard to Treaty obligations. The crews of these vessels have in several instances created serious disturbances and committed outrages against the persons and property of fishermen and settlers." These are grave accusations. If American fishermen have shown themselves in such force and acted with such audacity under a system of toleration, what may they not do under a system of perfect liberty and equality of rights?

Another fact deserving of notice is that in 1869, under the license system "the Americans employ tonnage varying between eight and eleven hundred vessels in these (Provincial) Fisheries. Their estimated annual catch, chiefly within the three mile limit, is valued at about \$8,000,000," \* against \$7,000,000 being the value of the exportations of British fishermen during the same time.

It is to be regretted that no statistics of the quantity of fish caught in the Provincial waters and exported to the United States during the period of the Reciprocity Treaty, have been kept by any of the Governments interested. Such statistics would throw much light upon the matter.

However, it is certain that the Reciprocity Treaty of 1854 admitted free into the United States nearly forty different products of the British Colonies, including fish of all kinds, poultry, eggs, butter, furs, timber and lumber of all kinds, &c., in consideration of the cession of our Fisheries, though less valuable in 1854 than they are to-day; and it is well known that our neighbours are not in the habit of giving more than they receive.

#### IV.—THE ST. LAWRENCE NAVIGATION AND THE TRANSIT AND COASTING TRADE.

For many years the United States have laid claim to the right of freely navigating the St. Lawrence river and canals. Canada, although denying the right, has always allowed them to exercise it, *pro tempore*, while the American rivers and canals have been, and still are, closed to Canadian vessels.

The 36th protocol contains nothing worthy of note upon this

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\* Annual Report of Minister of Marine (Ottawa, 1871). p. 70.

matter, and we, therefore, pass at once to the articles of the Treaty.

ART. 26. The navigation of the River St. Lawrence, ascending and descending from the 45th parallel of north latitude, where it ceases to form the boundary between the two countries, from, to, and into the sea, shall forever remain free and open for the purposes of commerce to the citizens of the United States, subject to any laws and regulations of Great Britain or of the Dominion of Canada not inconsistent with such privilege of free navigation. The navigation of the rivers Yucon, Porcupine, and Stikine, ascending and descending from, to, and into the sea, shall forever remain free and open for the purposes of commerce to the citizens of the United States, subject to any laws and regulations of either country within its own territory not inconsistent with such privilege of free navigation.

ART. 27. The Government of Her Britannic Majesty engage to urge upon the Government of the Dominion of Canada to secure to the citizens of the United States the use of the Welland, St. Lawrence, and other Canals in the Dominion, on terms of equality with the inhabitants of the Dominion, and the Government of the United States engages that the subjects of Her Britannic Majesty shall enjoy the use of the St. Clair Flats Canal on terms of equality with the inhabitants of the United States, and further engages to urge upon the State Governments to secure to the subjects of Her Britannic Majesty the use of the several State Canals connected with the navigation of the lakes or rivers traversed by or contiguous to the boundary line between the possessions of the high contracting parties on terms of equality with the inhabitants of the United States.

ART. 28. The navigation of Lake Michigan shall also, for the term of years mentioned in Article 33 of this treaty, be free and open for the purposes of commerce to the subjects of Her Britannic Majesty, subject to any laws and regulations of the United States, or of the States bordering thereon, not inconsistent with such privilege of free navigation.

ART. 29. It is agreed that for the term of years mentioned in Article 33 of this Treaty, goods, wares, or merchandise arriving at the ports of New York, Boston and Portland, and any other ports of the United States, which have been, or may from time to time, be specially designated by the President of the United States, and destined for Her Britannic Majesty's possessions in North America, may be entered at the proper Custom-House and conveyed in transit without the payment of duties through the territory of the United States, under such rules, regulations, and conditions for the protection of the revenue as the Government of the United States may from time to time prescribe, and under like rules, regulations, and conditions, goods, wares, or merchandise may be conveyed in transit without the payment of duties from said possessions through the territory of the United States for export from the said ports of the United States. It



is further agreed that for the like period goods, wares, or merchandise, arriving at any of the ports of Her Britannic Majesty's Possessions in North America, and destined for the United States may be entered at the proper Custom-House and conveyed in transit without the payment of duties through the said possessions, under such rules and regulations and conditions for the protection of the revenue as the Government of the said possessions may from time to time prescribe, and under like rules, regulations, and conditions, goods, wares, or merchandise may be conveyed in transit without payment of duties from the United States through said possessions to other places in the United States, or for export from ports in the said possessions.

ART. 30. It is agreed that for the term of years mentioned in Article 33 of this Treaty, subjects of H. B. M. may carry in British vessels, without payment of duties, goods, wares or merchandise, from one port or place within the territory of the United States, upon the St. Lawrence, the Great Lakes, and the rivers connecting the same, to another port or place within the territory of the United States as aforesaid; provided that a portion of such transportation is made through the Dominion of Canada by land carriage or in bond under such rules and regulations as may be agreed upon between the Government of Her Britannic Majesty and the Government of the United States. Citizens of the United States may for the like period carry in United States vessels without payment of duty, goods, wares, or merchandise, from one port or place within the possessions of Her Britannic Majesty in North America to another port or place within the said possessions. *Provided*, that a portion of such transportation is made through the territory of the United States by land carriage, and in bond, under such rules and regulations as may be agreed upon between the Government of the United States and the Government of her Britannic Majesty. The Government of the United States further engages not to impose any export duties on goods, wares, or merchandise carried under this article through the Territory of the United States, and Her Britannic Majesty's Government engage to urge the Parliament of the Dominion of Canada, and the Legislatures of the other Colonies, not to impose any export duties on goods, wares, or merchandise carried under this Article. And the Government of the United States may, in case such export duties are imposed by the Dominion of Canada, suspend, during the period that such duties are imposed, the right of carrying granted under this article in favour of the subjects of Her Britannic Majesty. The Government of the United States may also suspend the right of carrying granted in favour of the subjects of Her Britannic Majesty, under this Article, in case the Dominion of Canada should at any time deprive the citizens of the United States of the use of the canals in said Dominion on terms of equality with the inhabitants of the Dominion, as provided in article 27.

ART. 31. The Government of Her Britannic Majesty further engage to urge upon the Parliament of the Dominion of Canada and the Legislature of New Brunswick that no export or other duty\* shall be levied on lumber or timber of any kind cut on that portion of the American territory in the State of Maine watered by the River St. John and its tributaries,† and floated down that river to the sea, when the same is shipped to the United States from the Province of New Brunswick, and in case any such export or other duty continues to be levied after the expiration of one year from the date of the exchange of the ratifications of this Treaty, it is agreed that the Government of the United States may suspend the right of carrying hereinbefore granted under article No. 30 of this Treaty for such period as such export or other duty may be levied.

A point of international law which has never been clearly decided is, whether a river navigable through its course, is free to the inhabitants of all the countries through which it runs. This important question was fully discussed in the last number of the *Revue Critique*, to which we refer the reader. But it never occurred to any one that rivers made navigable only with the aid of artificial canals, were free by the mere force of international law. In such a case the right of a bordering nation is indeed only an imperfect one, to be conceded by the State in possession for the consideration of reciprocal commercial advantages alone; and it is this absence of reciprocity which strikes us in the part of the Treaty having reference to the navigation of the St. Lawrence.

The St. Lawrence being navigable upwards and downwards for seven months in the year from Montreal to the sea, requires a large public expenditure for light houses and also for the deepening and clearing of the channel at the head of Lake St. Peter. The privilege of freely navigating this river from the boundary line, on the 45th parallel near St. Regis, is granted to our neighbours for ever, in exchange for the liberty given to us to navigate the Stikine, Yucon and Porcupine,—the two latter streams rising in the rugged wilds of the Far North run into the Arctic Seas near Behring's Strait after traversing the Russian Territory, now the property of the United States. During three-fourths of the year, these rivers, which flow through a country that is not and

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\* This export duty amounts to \$43,000 on American lumber alone.

† This river was declared free to American and British subjects under the Ashburton Treaty, 1842.

probably never can be settled by civilized men\* are frozen nearly to the bottom. And this is the equivalent offered to us for the freedom of the St. Lawrence. The bargain is ineffably ridiculous, and would be laughable if it were not irrevocable.

It is to be hoped that the protest made by the Canadian Government against the Treaty not only comprehends that part of it which concerns the Fisheries, but also that which relates to the ratification by the Crown only, of the St. Lawrence navigation, Canada exercises the sovereignty of the river from the 45th parallel to the sea, and she cannot be deprived of it otherwise than by an Act of her own Legislature or at all events of the Imperial Parliament. The Queen, although possessing as a general rule the right of ratifying Treaties, does not possess the power of ceding any part of the Empire in the time of peace, without the consent of Parliament, as Forsyth has shown beyond any doubt, in his late work on Constitutional Law, pp. 182-187.† This want of power in the British Crown is incontestable, and has been formally recognized by the Joint High Commission and recorded in the Treaty itself in connection with the Fishery and Canal Questions.

It cannot be replied that Article 26 contains no cession, and that it is merely a recognition of the principle of international law, that all rivers situated like the St. Lawrence are free. For, firstly, the Article itself declares that it grants a privilege, not that it proclaims a right. Secondly, the fact that there are other rivers in the British possessions in the same position with the Stikine, Yucon and Porcupine, establishes beyond contradiction that the Treaty is not declaratory of a principle of international law.

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\* See Report of Survey by Capt. Raymond, U. S. A., 1869, printed as Executive Document No. 12, Senate, XLIIInd Congress. Captain Raymond sums up the capacity of the Yucon region for the fur trade by saying (p. 39) that the amount "will at most furnish a business for one Company and employment on the river for fifteen men." The timber "cannot for many years become an article of commerce, because large supplies, superior in quality, and much more accessible exist" nearer the market. Much the same may be said of the fish, in which it abounds; as for agricultural resources, they do not exist, and "no valuable mineral deposits in workable quantities have been found in the vicinity of the Yucon River up to the present time.—*The Nation*, 29 June, 1871.

† *Revue Critique*. See also Puffendorf, *Le Droit de la Nature*, vol. 2, p. 451, 453; Grotius, lib. 2, c. 6.

It is, indeed, very singular that the Columbia River, which rises in British Columbia, and flows to the sea through the State of Oregon and the Washington territory, has not been declared free to the inhabitants of both countries. By the Treaty of the 15th June, 1846, commonly known as the Oregon Treaty, between Great Britain and the United States, that river was declared free and open to the Hudson's Bay Company and to all British subjects trading with the same (Art. 2); but it has never, and justly so, been understood to apply to all British subjects. In the opinion of Mr. Webster, "the reservation of the rights in the Oregon Treaty to navigate the Columbia River enures to the benefit of the Hudson's Bay Company alone. The object was not a general grant of privilege to English commerce or English subjects generally." \* Such is likewise the general opinion of Canadian jurists. "This language," observed Mr. Justice Day, counsel for the Hudson's Bay Company, before the Commission named to settle the claims of that Company, speaking of the free navigation of the Columbia, "imports that the right reserved was for the benefit of the Company alone; it is not extended to any class of persons other than those whose business is solely with and for this body." † It is therefore extremely surprising that a river so important to Canadians, more especially when British Columbia is admitted into the Dominion, has not been declared free to them at the same time as the St. Lawrence to American citizens.

Mr. McKinlay says: "The importance of the navigation of the Columbia river to the business of the Company and as a means of communication was very great; it was almost an absolute necessity to them, as without it they would be compelled to transport their goods by horses, which would have destroyed all the profits of their trade. Without the river, in my opinion, they would not have come into the country at all to commence their business, nor have carried it on with any hope of success. The river being useless for navigation without the free use of the portages, the importance of their being always free and open must be apparent." ‡

The only condition on which the free navigation of the St. Lawrence and all the rivers and canals of the Dominion could be

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\* Memorial and argument on the part of the Hudson's Bay Company, Montreal (1868), p. 183.

† Ibid.

‡ Ibid. p. 184.

justly granted to our neighbours is that they should follow the example of European nations and give us in return the free navigation of all their rivers and canals connecting with Canadian waters, in addition to an extra toll or commercial advantage as indemnity for the greater cost of our public works and their higher value to Americans in comparison with the value of American public works to Canadians. A treaty to this effect, although more favourable to the United States than to Canada, since the navigation of the St. Lawrence and its canals is the indispensable outlet of 17 millions of people in the Western States, would at all events possess the merit of being based upon equity and of approximating to the maxim of natural law that commerce is free.

It remains for us to observe that to proclaim the free navigation of the St. Lawrence, the navigation whereof is impossible on account of its insurmountable falls and rapids, is to declare an impossibility. But, it may be said, the right of navigating the St. Lawrence in ascending and descending being conceded, we must conclude that it comprehends the right of using the Lachine and Beauharnois Canals, without which navigation upwards is impossible. To this we answer: 1st. That the right designated by Article 26, is a natural right, and can comprise only what exists naturally. 2nd. That Article 27 of the Treaty declares that the grant of the use of the Dominion Canals can only be made by the Dominion Government. 3rd. And lastly, the grant by the Crown only of the use of our Canals being equivalent to a cession of territory, is contrary to English constitutional law.

Thus, by Article 26, American citizens have the privilege of going down the river, but not that of going up from Montreal to the 45th parallel.

Will the Canadian Government come to their rescue in this difficulty, and secure for ever to them the use of all the Canals in the Dominion for the sole consideration of the use by British subjects of the St. Clair Flats Canal and the several State Canals connected with the navigation of the lakes or rivers traversed by or contiguous to the boundary line, as provided by Article 27? The inequality of the bargain is so enormous, (Canada really needing only the Sault Ste. Marie Canal, one mile in length,) that there cannot be any doubt the Canadian Government (who, in a matter of this kind, can act only with the advice of the Dominion Parliament), will refuse to give, as a permanent right,

the privilege demanded, except on payment of extra toll and the perpetual grant of at least the transit trade by land and water, as indemnity for the construction of these Canals, which are 220 miles in length, and have cost nearly \$20,000,000. Such an indemnity is far from being exorbitant, and is authorized by precedents. Thus, the navigation of the Danube is at the common expense of the several States enjoying the same. Woolsey, an *American* authority on international law, says: "When a river affords to an inland State *the only*, or *the only convenient* means of access to the ocean and to the rest of mankind, its right becomes so strong, that according to natural justice, possession of the territory ought to be regarded as a far inferior ground of right. Is such a nation to be crippled in its resources and shut out from mankind, or should it depend on another's caprice for a great part of what makes nations fulfil their vocation in the world, merely because it lies remote from the sea, which is free to all? Transit, then, when necessary, may be demanded as a right; an interior nation has a servitude along nature's highway, through the property of its neighbour, to reach the great highway of nations. It must, indeed, give all due security that trespasses shall not be committed on the passage, and pay for all equitable charges for improvement and the like; but this done, its travellers should be free to come and go on that water road, which is intended for them." Need we point out that if we cannot close our rivers and canals when offered *payment for equitable charges*, our neighbours cannot refuse us the winter transit trade, for which we have always paid the railway freight, the equitable charge whereof Woolsey speaks\*: On the other hand, payment of tolls on a footing of equality with the inhabitants of Canada by American vessels passing through our rivers and canals and receiving freight, is every thing but an equivalent for the use of our territory.

In any case, the use of our Canals should be granted only for the time during which the coasting and transit trade and other concessions contained in Articles 27, 28, 29 and 30 shall continue to exist, namely ten years. If the navigation of our Canals be

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\* The report of Mr. Larned [1871] states that the goods shipped through the United States *in transitu* to Canada were of the value of \$16,519,637. The freight on such a volume of trade must amount to a very large sum.

declared free to our neighbours forever, as provided for by the Treaty, we shall, in ten years, be at their mercy for our winter imports from Europe.\* It is therefore of the highest importance to keep well in hand the only available means that can enable us to secure the continuation of these commercial advantages.

#### V.—THE SAN JUAN QUESTION.

It is a principle derived from the Roman law and universally admitted into the municipal laws of civilized nations and also by writers on international law, that when two neighbouring citizens or States disagree concerning their common boundary, the dispute must be settled by their titles, and that in case of doubt, the benefit of the doubt shall be given to the party first in possession. This principle, although grounded in reason and justice, has been repeatedly violated by the American Government in its relations with its neighbours in general and with Canada in particular. The dispute respecting the Northern Boundary goes back to the foundation of the Republic, and notwithstanding that several treaties have been entered into and surveys made under their provisions for the purpose of determining the Boundary, we seem to be still far removed from a definite settlement.

In the second article of the Treaty of Peace of 1783, the Northern Boundary of the United States is fully described as running along certain "Highlands" dividing rivers flowing into the St. Lawrence from rivers flowing into the Atlantic Ocean, and thence by a specific line westward to the river Mississippi.

As early as the year 1792, the United States began to claim the highlands to the north of the St. John River as being the "Highlands" referred to in the Treaty, the British Government contending, on the other hand, for the highlands to the south of that river. After a great deal of diplomatic correspondence and agreements, the Ashburton Treaty of 1842 was concluded, whereby Great Britain ceded 3,337,000 square acres of the disputed territory to the United States.†

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\* The Inter-colonial Railway, which will be completed within two years, may prove to be passable in winter. In that case the transit trade through the United States will not only not be needed, but will be positively injurious to that national railway enterprise.

† Observations on the Treaty of Washington (1843) by G. W. Featherstonhaugh.

At the time when the Treaty was ratified, the British Government, although being aware of the existence of an original map showing the position of the Boundary line, were unable to discover the same.

During the negotiations, the American Secretary of State, Mr. Webster, who concluded this treaty with Lord Ashburton, solemnly reiterated his own belief and that of the branches of the American Government in the justice of their claim. In one of his letters, he said: "I must be permitted to say that few questions have ever arisen under this Government in regard to which a *stronger conviction was felt that the country was in the right*, than this question of the North-Eastern Boundary." \*

But, a short time after the ratification of the Treaty by the United States Senate (in secret session), the *Washington Globe* published to the world the fact that the Senate had been for some time previous in possession of such a map, discovered by one Mr. Sparks, as reported by himself in a communication to the American department of State:

"While pursuing my researches among the voluminous papers relating to the American Revolution in the *Archives des Affaires Etrangères* in Paris, I found" said Mr. Sparks, "in one of the bound volumes an original letter from Dr. Franklin to Count de Vergennes, of which the following is an exact transcript:

"PASSY, December 6, 1782.

"SIR,—I have the honour of returning herewith the map your Excellency sent me yesterday. I have marked with a *strong red line*, according to your desire, the limits of the United States, as settled in the preliminaries between the British and American plenipotentiaries.

"With great respect, I am, &c.,

B. FRANKLIN."

"This letter was written six days after the preliminaries were signed; and if we could procure the identical map mentioned by Franklin, it would seem to afford *conclusive evidence* as to the meaning affixed by the Commissioners to the language of the Treaty on the subject of the Boundaries. You may well suppose that I lost no time in making inquiry for the map, not doubting that it would confirm all my previous opinions respecting the validity of our claim. In the geographical department of the *Archives* are sixty thousand maps and charts; but so well arranged with catalogues and indexes that any one of them may be easily

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\* *Civilized America*, by Grattan, p. 377.



found. After a little research in the American division, with the aid of the keeper, I came upon a map of North America by D'Auville, dated 1746, in size about eighteen inches square, on which was drawn a *strong red line* throughout the entire boundary of the United States, answering precisely to Franklin's description. The line is bold and distinct in every part, made with red ink, and apparently drawn with a hair pencil, or a pen with a blunt point.

*"Imagine my surprise on discovering that this line runs wholly south of the St. John's and between the head waters of that river and those of the Penobscot and Kennebec. In short, it is exactly the line contended for by Great Britain, except that it concedes more than is claimed." \**

Comment on the conduct of the United States in this matter is superfluous. "There being no room to doubt the authenticity of the map," said Mr. Featherstonhaugh, p. 102,† "we are unavoidably brought to a conviction that whilst the highest functionaries of the American Government were dealing with Lord Ashburton with a seeming integrity, they were in fact deceiving him; and that whilst they were pledging the faith of their Government for a perfect conviction of the justice of their claim to the territory which was in dispute, they had the highest evidence in their possession which the nature of the case admitted of, that the United States never had had the slightest shadow of right to any part of the territory which they had been disputing with Great Britain for nearly fifty years."

The North-Eastern Boundary being thus disposed of, our neighbours fastened their eyes upon the North-West. Great Britain was then in legal possession of the Oregon Territory, comprising the whole basin of the Columbia, as has been proved in the clearest manner by Mr. Meredith in a vigorous pamphlet published at Montreal in 1846.‡ Yet for the sake of peace, the

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\* The Ashburton Treaty by Featherstonhaugh, p. 104; Grattan, *Civilized America*, p. 387.

The Franklin map was brought to the notice of the Senate by Senator Rives, to induce that body to take the conceded territory of Maine, rather than expose the country to the total loss of the whole ground claimed by the United States, to wit, about 7,000,000 acres of land.

† Before the publication of the Franklin map, Mr. Featherstonhaugh was one of the most devoted defenders of the Ashburton Treaty in England.

‡ See also Travers Twiss on the Oregon Treaty, New York, 1846.

Territory of Oregon was for the most part abandoned to the United States by the Treaty of 1846.

The interpretation of this Treaty has given rise to a new claim on the part of our neighbours. The gist of the question lies in the first article, which establishes the line. These are the words :—

“ From the point on the 49th parallel of north latitude, where the boundary laid down in existing treaties and conventions between the United States and Great Britain terminates, the line of boundary between the territories of the United States and those of Her Britannic Majesty shall be continued westward along the said 49th parallel of north latitude *to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly through the middle of the said channel and of Fuca's Straits to the Pacific Ocean* ; provided, however, that the navigation of the whole of the said channel and Straits South of the 49th parallel of north latitude remain free and open to both parties.”

The United States contend that the channel designated by the Treaty, is not that of the Gulf of Georgia and the Vancouver or Rosario Strait (the only channel of navigation in use in 1846), as maintained by Great Britain, but that of the Canal de Haro which runs close to the shores of Vancouver's Island. In our humble opinion the channel of the Treaty is not the channel of navigation either then or now in use, but the channel or main body of water *separating the Continent from Vancouver's Island*. The Canal de Haro being a small strait between Vancouver's Island and San Juan, can only be a fragment of this *Channel*.

If the boundary line be finally run through this channel of Rosario, San Juan and other islands fall to Great Britain, if through the Canal de Haro, they fall to the United States.

A resident of Victoria, V. I., well acquainted with the facts observes :

“ To the United States the islands are really useless, except for purposes of annoyance, eyesore and impediment. They are far removed from their territories on the mainland, and their position is intended evidently as a wedge to wrest Vancouver's Island and British Columbia from England.

“ To Great Britain the Island of San Juan is of the first importance. It is the key to the Gulf of Georgia. It commands the narrow channels through which alone British Columbia and

the inner coast of Vancouver's Island can be approached. We require it to give us a right of access, ingress and egress to our own possessions, unmolested by another power. Both Vancouver's Island and British Columbia had better be given up if we part with San Juan; for a fortification on this island would command our western passage to Fraser River by the Canal de Haro, while if we are foolish enough to submit to the line being run through the Canal, and the Americans, consequently, get the group, they can also fortify Lopez and other islands, and completely command the eastern passage of Rosario and shut us out entirely from our own mainland. The most strained interpretation of the Treaty will not give them the line they claim; but it is not the true construction or meaning of treaties they want to arrive at. It is possession of our new gold country, of which they are rabidly jealous."\*

By the Washington Treaty of 1871, the United States will probably be put in possession of the Island of San Juan, and we may be sure that before many years elapse, we shall be called upon to cede some other piece of territory to which our neighbours may find it agreeable to set up a claim. In fact Captain Raymond, an American exploring officer, has already reported to his Government that there is something wrong about the boundary of Alaska.†

It is astonishing that Great Britain, while consenting to the reconsideration of the Northern Boundary Line, did not insist upon a re-adjustment of the North-Eastern Boundary, as the latter had been obtained by fraud and bad faith. Judge Story, upon learning the existence of the Franklin Map, said that the American Government's conduct was "a most disgraceful proceeding," and "that he was even prepared for the British Government insisting on a reconsideration, if not the annulling, of the Treaty." ‡ Senator Benton, one of the strongest supporters

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\* London *Times*, 27th Sept. 1859; *Civilized America*, by Grattan, 2nd ed. 1859, note, p. xix.

† The New York *Nation*, 29th June, 1871, while noticing Captain Raymond's Report of his Survey on the West Coast of Alaska, says: "Captain Raymond's chief errand was to ascertain if Fort Yukon lay within the territory of the United States, since the Hudson's Bay Company had possession of it. He found that it clearly did, and hoisted the flag over it."

‡ Grattan, *Civ. America*, p. 386.

of the American claim, observed that "if the maps were authentic, the concealment of them was a fraud on the British, and that the Senate was insulted by being made a party to the fraud," and that "if evidence had been discovered which deprived Maine of the title to one-third of its territory, honour required that it should be made known to the British." \*

The articles of the Treaty of Washington of 1871, relating to San Juan are as follows :

ART. 34. Whereas it was stipulated by Article 1 of the Treaty concluded at Washington on the 15th of June, 1846, between the United States of America and Her Britannic Majesty, that the line of boundary between the territories of the United States and those of Her Britannic Majesty, from the point on the 49th parallel of north latitude up to which it had already been ascertained, should be continued westward along the said parallel of north latitude to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly along the middle of the said channel and of Fuca Strait to the Pacific Ocean; and, whereas, the Commissioners appointed by the two high contracting parties to determine that portion of the boundary which runs southerly through the middle of the channel aforesaid were unable to agree upon the same; and whereas the Government of Her Britannic Majesty claims that such boundary line should, under the terms of the Treaty above-recited, be run through the Rosario Straits, and the Government of the United States claims that it should be run through the Canal De Haro, it is agreed that the respective claims of the Government of

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\* Grattan, *Civ. America*, p. 391.

We cannot fail to observe that in all the treaties between England and the United States, the British Plenipotentiaries have been taken at a disadvantage by those of the United States; the latter, being well acquainted with the places and things concerning which they were treating, have uniformly succeeded in deceiving the British representatives, all more or less ignorant of the interests and resources of the Colonies. Hence the geographical errors and difficulties of interpretation contained in every treaty from that of 1783 to that of 1846; and no one should be surprised if the case is found to be the same in the Treaty of Washington of 1871.

Since the signing of the Treaty an American official map has been discovered, showing that the United States have no right to San Juan Island. This map was published in 1848, and is entitled "Map of Oregon and Upper California, from the Survey of John Charles Fremont and other authorities; drawn by Charles Preuss under the order of the Senate of the United States, Washington City, 1848. Lithographed by Weber & Co., Baltimore." It is asserted that the American Government has called in and destroyed all the copies thereof obtainable.

Her Britannic Majesty and of the Government of the United States shall be submitted to the arbitration and award of His Majesty the Emperor of Germany, who, having regard to the above-mentioned article of the said Treaty, shall decide thereupon finally and without appeal which of these claims is most in accordance with the true interpretation of the Treaty of June 15, 1846.

All the articles from p. 35 to p. 42, inclusive, have reference to procedure only.

#### VI.—CONCLUDING REMARKS.

Under those circumstances will the portion of the Treaty of Washington relating to the Fisheries and the Canals be ratified by the Provincial Legislatures?

There is no room to doubt that Newfoundland, the greater part of whose coast is open to American fishermen by virtue of the Convention of 1818, and which consequently can only be benefited by the Treaty (their fish not having been free of duty) will ratify it without delay. But Newfoundland cannot benefit by the Treaty until it has been ratified as provided for by Art. 33.

With respect to Prince Edward's Island, if we may judge by the past policy of its Government, always hostile to that of the Dominion Government, the legislature of that Colony will also undoubtedly give its assent to it. The Executive Council declared on the 2nd September, 1870, as follows: \*

"Fairly stated, the old policy revived demands from the people of Prince Edward Island, the exclusion from their harbours of their best customers—customers who have employed the Colonial marine in importing salt for their use, the Colonial mechanics in manufacturing their barrels; customers who have purchased their clothing, their provisions and their sea-stores in the Island markets. These men are to be expelled until the forty millions citizens of the United States succumb to the pressure put upon them by four millions of Colonists, and consent to concede reciprocity in exchange for free access to the fishing grounds and harbours of the Colonies." \*

What line of conduct will be followed by the Government of Canada? Let us interrogate the past and perhaps we may draw a conclusion as to the future.

It must be admitted that the policy of the Dominion Government has hitherto been preeminently a national one.

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\* Correspondence between the Government of the Dominion and the Imperial Government on the subject of the Fisheries (1871) p. 53.

Lord Granville, in a cable despatch to the Governor-General of Canada, dated the 6th of June, 1870, expressed "the hope that the United States fishermen will not be for the present prevented from fishing except within three miles of land or in bays which are less than six miles broad at the mouth."\* Evidently the British Government wished to tolerate, for the time being, the pretensions of the United States in the headland dispute. The following answer was returned by the Government of Canada to this request :

"Reference is particularly requested to Reports of the 15th and 20th of December last, in which the whole matter in question is fully set forth. The conclusions arrived at were,—that, as the American Government had voluntarily terminated the Treaty of 1854, and ever since failed to consider any propositions regarding an equivalent for our own in-shore fisheries, notwithstanding an intermediate license system which continued to United States citizens the same fishery privileges they had enjoyed under the Reciprocity Treaty, on merely formal conditions, all such concessions should be absolutely withdrawn and our rights duly enforced as they existed and were upheld anterior to that reciprocal compact." †

The Minister of Marine in his official report ending 30th June, 1869, said :

"The material worth and national importance to Canada of the coast and inshore fisheries in British American waters can scarcely be over-estimated. Their produce and control are of especial value to Nova Scotia, and that Province might reasonably expect from the union of Colonial interests some accession to the vigor and authority with which our exclusive fishery rights within treaty limits have been already maintained by the authorities of that Province.

"The undersigned need not enlarge upon the vital and vast importance to the Dominion of Canada of a strict maintenance of those principles of maritime jurisdiction and rights of fishery derivable from the Parent State. Immense as is the intrinsic value of the exhaustless Fisheries which form so large a portion of our material resources, their rightful control and exclusive use possess a peculiar value and significance intimately connected with the new condition and prospects of this country. The actual situation and future development of these inshore fisheries acquire, if possible, additional importance from the selection of a sea-board line of railway connecting the hitherto separated Provinces of the British North American Confederation.

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\* Correspondence with the Government of the Dominion, &c., p. 31.

† Ibid, p. 30.

" If these Provinces must in future depend more fully on their own resources and open new markets for their natural products, our attention cannot now be too soon turned to the development of our vast and valuable Fisheries. They should form the staple of an extensive and lucrative trade with foreign countries, and with the other British Colonies. They provide an important nursery for our seamen, and they afford an inexhaustible field for the skill and energy of our sea-board population. They possess a great and peculiar value to Canada. Their exclusive use, therefore, affords these united Provinces such advantages as a young country cannot too highly estimate, and should on no account neglect or abandon."

Accordingly eight well equipped vessels were sent to the Gulf and Atlantic coasts in 1870, by the Government of Canada, to protect our Fisheries against the encroachments of foreign fishermen.

Such was the language and the conduct of the Government in 1860 and 1870, and it is needless to add that it has been fully endorsed by the Canadian Parliament. Why should its policy not be to the same effect in 1871 ?

It has been already stated by one of the honourable members of the Cabinet, the Hon. Mr. Langevin, that so soon as the Government of Canada heard that the Commission was about to give up the Fisheries for the small consideration mentioned in the Treaty, they protested energetically. The Honourable Minister added :—" It will be for England to show to Canada what reasons and inducements there are for us, as a people, to ratify that portion of the Treaty relating to the Fisheries ; but, in the meantime, Canada remains free to act,—the Government of Canada is untrammelled. I say all the ministers, including the Prime Minister, remain free to act as the interests of Canada may require. Parliament will have the matter laid before it at its next Session, and the representatives of the people will be then in a position to say whether the reasons given by England for the ratification of that portion of the Treaty by us, are such as the true interests of Canada call for." \*

It has been asserted that the Government of Canada is bound to defend the Treaty, *coute que coute*, because the First Minister signed it. It is replied that he signed it under protest, and only to further the settlement of the Alabama claims.† We cannot conceal from ourselves, however, that the Honourable Premier's

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\* Montreal Gazette, 15th June, 1867.

† Ibid, 27th June, and also 6th July.

signature to the Treaty is a fact greatly to be regretted. In view of the numerous and palpable acts of injustice, of which Canada was the victim, Sir John A. Macdonald (whose signature was not necessary to the settlement of the Alabama question, since the required majority existed without him) owed it to his country and to the past policy of his Government, not to protest merely, but to resign, as Judge Day did in the matter of the Provincial Arbitration. There is no evidence that he even protested—at least protocol 36, the only official report of the proceedings of the Commission, makes no mention of it. But whether he did so or not, it is unreasonable to conclude that the Government of the Dominion, who, in protesting against the Treaty, have done all that the circumstances demanded, can be held responsible for the *faux pas* of the Premier acting in his capacity of British Commissioner, or should be deprived of their freedom of action in a matter of such importance. It is to be hoped, at all events, that if the Canadian Executive does not make the ratification of the Treaty a Ministerial question, they will leave it as an open question to the Parliament. It is but fair that the country should take the responsibility, as it must accept the consequences, of the rejection of the part of the Treaty which relates to the Fisheries and the Canals.

We may remark that public opinion has pronounced decisively against the Treaty through the press. Scarcely more than two or three journals have entreated in a hesitating way to await its justification by the English Government before Canada decide to reject it. But more: one Provincial Legislature (that of New Brunswick) happened to be sitting at the time when the Treaty was published. On the 17th of May, upon motion by the Attorney-General, the House of Assembly resolved unanimously,—

“1. That the privileges accorded to subjects of Great Britain by the nineteenth and twenty-first articles of the Treaty are by no means an equivalent for the privileges accorded by the eighteenth article to the inhabitants of the United States. That the reciprocal privilege of fishing in certain American waters is barren and delusive, and that the mode of determining and accounting for excess in value of the privilege accorded by the Government of Great Britain over those accorded by the Government of the United States is erroneous in principle and impracticable in execution, and the considerations of advantage are too remote and uncertain.

“2. That in any Treaty relating to the free use of the Fisheries and to the Navigation of Rivers and Canals, Canada should, at the same



time, make provisions for the further regulation of commerce and navigation beyond those secured by the articles of the Treaty as above concluded, in such manner as to render the same reciprocally beneficial and satisfactory.

"3. Further resolved that in the opinion of this House the Parliament of Canada should, under existing circumstances, adhere to and carry out the policy of protection of the fishery rights of the Dominion of Canada recently adopted, and should not give assent to the articles of said Treaty relating to the Fisheries."\*

On the 18th of May, Lieutenant-Governor Wilmot, in his speech, expressed himself as follows :—

"The result of the deliberations of the Joint High Commission at Washington, so far as our Dominion and Provincial interests are involved, is calculated to excite alarm and dissatisfaction; but we cannot for a moment suppose that the Dominion Parliament will give its consent to those parts of the Treaty which dispose of our invaluable fishery rights for the veriest mockery of an equivalent, when we should have received therefor at least the free admission to United States markets of our ships, coal and lumber."†

Will this protest, coming from a Province so deeply interested in our Fisheries and so well acquainted with their value, be heeded? At all events, it is a matter of the deepest importance that the Dominion Legislature should approach the question in a spirit absolutely free from party politics, and that its vote should be the deliberate and faithful expression of the public opinion of Canada.

It will be for England, said the Hon. Mr. Langevin in his speech above referred to, to show the reasons why Canada should ratify the Treaty, and for Parliament to say whether they are sufficient. In our humble opinion, England should not interfere in the matter. The mischief she has caused us by mixing up our commercial disputes with the Alabama claims, is already great enough. She must not by orders to the Government of the Dominion make it irreparable; and we sincerely trust to see realized the hope expressed by the Earl of Derby in the House of Lords on the 12th of June, that the Canadians would be left perfectly free to express their own opinion upon that part of the Treaty, unbiassed by any hint that if they refused their ratification, they must not look for any further protection from us. ‡

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\* *Montreal Gazette*, 18th May.

† *Ibid* 19th May.

‡ *Ibid* 27th June, 1st July.

And what sufficient reasons can England show ? How can any conscientious mind acquainted with all the facts be persuaded that Canada should be made the scape-goat for the faults of the Empire ? We are entreated to yield for the sake of peace. The peace policy, excellent though it be, must have its limits ; it must not be allowed to become a policy of weakness. For then the peace which is bought at so high a price is not a benefit, but a calamity. We would say to the defenders of the Treaty on the other side of the Atlantic : In 1783, by the Treaty of Recognition of the United States, you abandoned the State of Illinois, and other vast and valuable territories, which had been ceded to Great Britain by France in 1763, as part of *La Nouvelle France* or Canada.\* In 1818 you gratuitously ceded the Fisheries on the unsettled shores of Newfoundland and Labrador, and abandoned your right to a Boundary Line to the Mississippi. In 1842 you gave up the territory of Maine, in spite of the fact, since demonstrated by the clearest evidence, that the American Government well knew they had not the shadow of a right to it. In 1846, by the Oregon Treaty, you abandoned the Columbia river and the Oregon territory.

To-day you surrender the Island of San Juan, the Fisheries, and the Navigation of our Rivers and Canals. And all that for the sake of peace. But do you not see that such a policy will eventually lead you to the total sacrifice of all the British Possessions in America, piece by piece, or at least that you will have so diminished and crippled their natural resources as to force them to break the Colonial tie and throw themselves into the arms of the fortunate Republic. These fears, be it observed, are not vain and chimerical ; they are unfortunately too well founded, and the fact that the Treaty is viewed with favour by certain Canadian newspapers well known for their American proclivities, shows that such is its anticipated result.

But is it true that the concessions, which Canada is called upon to make, are necessary for the preservation of the friendly relations between the two great sister powers ? Proof of the contrary is to be found in the Treaty itself. If peace or war depends on the surrender of our Fisheries and our Canals, whence comes it

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\* Even the Quebec Act, 1774, 14 Geo. 3, c. 83, sect. 1, of Consolidated Statutes of Canada, declares that at that time the Province of Quebec extended to the Province of Pennsylvania and the Ohio and the Mississippi Rivers.

that the Parliament of Canada (which can constitutionally exercise no control over the foreign policy of the British Crown) is invested with the decisive vote? It would then be in the Colony's power to drag the Mother Country into a conflict with the United States—the very thing to be avoided! And the United States consent to submit to such a contingency! The supposition is, therefore, not only unfounded but utterly absurd and ridiculous. No: it was not in the Americo-Canadians controversies that the seeds of serious dissensions lay concealed, but in England's unjustifiable delay to settle the Alabama claims. If the British Government instead of standing on its honour and dignity and resorting for aid to every species of subterfuge, had from the first or at any time afterwards even during the deliberations of the Commissioners, frankly admitted that Great Britain was in the wrong and offered to make fair compensation for the depredations of the cruisers, the United States would certainly have consented to give us a trade equivalent for our Canals and Fisheries.

What is, finally, the reason why Canadian interests have been sacrificed by the Treaty? The leading journal of the United Kingdom has had the courage to publish it in the following guarded but significant words: "Little ingenuity" says the *London Times* of the 9th June, "would be required to represent this" (the surrender of the Fisheries) "as a sacrifice of small communities to the convenience of powerful States. There was most certainly no intention on the part of the Commissioners of this Country to make any portion of our Empire a scape-goat for the peace of the whole. But it was never disguised that something the Maritime Provinces hitherto have possessed had been bartered away by the Treaty."

Yet this paper boasts that the Treaty of Washington will be ratified by the Parliament of Canada!!

D. GIROUARD.

Montreal, 12th July, 1871.

## WRIT OF PROHIBITION.

A government which has made much advancement in civil jurisprudence, has observed the importance of having a variety of courts, and those of different grades. A portion of those controversies which arise among people, are of such character, that a court presided over by a person of limited legal knowledge, is ample to administer justice and law between the parties. They involve matters of inconsiderable importance in value, and are governed by rules of law plain and well understood. And the convenience of having the trial of them brought to the immediate neighbourhood of the parties, overbalances the evils which result from occasional mistakes of such unlettered and unlearned courts. Some controversies, however, involve matters of greater pecuniary importance, or raise questions of law upon which there is room for doubt, and which demand the consideration of minds learned in legal science, and accustomed to discriminating thought.

Intelligent legislation, therefore, divides judicial powers, giving to courts of inferior grades such judicial authority as is consonant with the capacity of the persons presiding in them, and withholding from them all those matters which demand greater ability; and creating, for the determination of important and difficult questions, courts representing a higher degree of talent and learning. It may well be expected that inferior courts will be as liable to be mistaken as to the extent of their jurisdiction as in other matters; and that higher courts will be better judges of not only their own powers but also of the judicial powers of inferior courts. It is therefore important that courts of higher grades should possess a supervisory power over courts of an inferior grade, and that they should possess the power to control and stop them when they are about to exceed the proper and legal limits of their authority. At common law higher courts were invested with this authority over inferior courts; and the process by which they prevented an inferior court from proceeding further in a matter not within its jurisdiction was denominated a writ of prohibition.

The remedy by this writ is not now as often resorted to as formerly, but still exists, although a distinguished attorney not

long since, while arguing a cause in the Court of Appeals in the State of New York, denominated it an obsolete remedy. Modern treatises and works on practice say little, if anything, upon this branch of the law, and very few cases of prohibition find their way into our reports. If, therefore, we desire to learn much of this remedy, we are under the necessity of going to the earlier reports and treatises, which, unfortunately, are fast disappearing from our libraries.

We do not profess to be proficient in this branch of the law; and write upon it, more with the view of calling the attention of the Bar to it, than of throwing light upon it. For, while we are not under the necessity of resorting to this remedy so often as to many others, it is yet many times a very valuable and effective remedy, and is one we cannot afford to consign to oblivion. It seeks to prevent instead of repairing injuries. It does not undertake to undo what is done, but to stop the doing of that which ought not to be done. It reaches cases and parties, which can be reached in no other way, and by no other process. In its character it is similar to the remedy by injunction. And yet it is applicable to a different class of cases and issues to parties to whom a writ of injunction will not lie.

While constitutional or legislative provisions in the States and Canada recognize the existence of this remedy, these provisions do not undertake to provide when the remedy is proper, nor to direct the mode of practice, but leave it as it existed at common law. As a sample of the legislation on this subject, we will here give the law of Lower Canada, which is as extensive and comprehensive as the constitutional and statute law of many or all of the States.

"Writs of prohibition are addressed to Courts of inferior jurisdiction, whenever they exceed their jurisdiction. They are applied for, obtained, and executed in the same manner as writs of mandamus, and with the same formalities."—Code of Civil Procedure, Art. 1031, Sec. 4.

The thirteenth section of the Judicial Act of the United States provides that: "The Supreme Court shall also have appellate jurisdiction from the Circuit Courts, and Courts of the several States, in cases hereinafter provided for; and shall have power to issue writs of prohibition to the District Courts, when proceeding as Courts of Admiralty and maritime jurisdiction, and writs of mandamus in cases warranted by the principles and usages of

law, to any Courts appointed or persons holding office under authority of the United States."

Without, therefore, a knowledge of what the common law was upon this subject, we can have but a very limited understanding of the remedy by prohibition, as it exists in the States, and in Canada.

A prohibition has been defined a "Writ issuing properly only out of the Court of King's Bench, being the King's prerogative writ; directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof upon a suggestion, that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court."

It was denominated one of the King's prerogative writs, because it was deemed the right or privilege of the Sovereign to take supervision of, and to control his substitutes, and to compel them to do right, and to administer justice according to law. It therefore, formerly issued out of the Court of King's Bench only; as in that Court, the King was understood to preside in person, and aided in the administration of justice. And according to the theory of the common law, the King is the fountain of justice, and when the laws do not afford a remedy, and enable the individual to obtain his right, by the regular forms of judicial proceedings, the prerogative powers of the Sovereign may be brought in aid of the ordinary judicial powers of the Court. It had its origin in the will of the King, and not from legislative enactment. It was not a remedy provided by law, but was unknown to the law, and was given and granted by the Sovereign, because in theory, he was the fountain of justice, and might and should provide the means, by which the subject could obtain his right. But by long continued use, this remedy has outgrown its sovereign independent character, and is now regulated by law.

At first, as has been said, the writ issued out of the Court of King's Bench only; but afterwards the power to issue the writ to inferior courts was extended to the Court of Chancery, the Exchequer Court, and even the Court of Common Pleas. In the States, the power to issue the writ is generally given to certain specified courts, either by their constitutions, or by legislative enactments. In the absence of such provisions, it is apprehended that no court could issue this writ, unless it possessed the general superintending power of the Court of King's Bench, or the

general equitable powers of the English Court of Chancery. And when express authority is given by the constitution or by statute to a court to issue this writ in certain specified cases, it must be presumed that there is no authority to issue it in any other cases; upon the maxim, "*expressio unius est exclusio alterius.*"

In the issuing or withholding of this writ, the court is to be governed by a sound discretion. Not an independent, arbitrary, and irresponsible discretion, but a legal discretion. One that is founded upon and constituted by the principles of equity, and the rules of law.

Nor should the courts, in issuing this writ, be governed by narrow and technical rules, but should regard it as a convenient mode of exercising a wholesome control over inferior tribunals; for it is far better to prevent the exercise of an unauthorized power than to be driven to the necessity of correcting the error after it has been committed, and after the parties have been to the expense and annoyance of a trial in the inferior court. Such were the principles upon which courts formerly acted, and there is now no less reason for so acting than formerly.

The writ may be issued on the application of the party interested in the proceedings sought to be stayed, or on the application of a stranger to such proceedings. For it is apprehended that the keeping of all courts within their proper and legal jurisdiction is of such general interest and of such public importance, that the sovereign power should be exercised whenever and however informed of an intention in any tribunal to overreach the proper and legal limits of its jurisdiction.

But in order to authorize a court to issue this high prerogative writ, the inferior court, against which it is directed, must be actually proceeding to act in a matter where it has no jurisdiction; a mere apprehension that such court will undertake to act, is not sufficient. For the presumption that no court will proceed in any matter not within its jurisdiction, is so strong, that it cannot be rebutted, except by the fact that it has actually commenced to act.

The writ is issued against the judge of the inferior court, and the party who is prosecuting the proceedings in such court, which is sought to be stayed; and it commands them to no further proceed in such case; disobedience of the command is punished by the attachment of the judge and party, followed by fine and imprisonment at the discretion of the court, as for contempt.

The writ is allowed to any inferior court, whether temporal, military, or ecclesiastical, and to the court of admiralty. At one time there was great strife between the civil and ecclesiastical courts; the latter were eager to extend the limits of their jurisdiction, and the former to keep the ecclesiastical courts strictly within their acknowledged jurisdiction. Consequently the writ of prohibition was frequently resorted to; and therefore much of the learning upon this branch of the law, is found in the reports of cases where the writ was issued to ecclesiastical courts.

The writ is allowed whenever it is made to appear that an inferior court is exceeding the legal bounds, and proper limits of its jurisdiction, either by proceeding in a matter not within the jurisdiction of such court, or when the court has no jurisdiction over the person of the party complaining, or when a suit is commenced in an inferior court, upon a matter within its jurisdiction, but a matter arises in the defense of such action, which is not within the jurisdiction of such inferior court.

As illustrative of these propositions, we will here present a few cases where the courts have held the writ allowable.

In the case of *The People vs. the Tompkins* General Sessions, 19 Wend. Rep. 154, it was held that when a court is entertaining jurisdiction over a case in appeal, when no appeal was allowable by law, prohibition was a proper remedy.

In the case of *Quimb Appo. vs. The People*, 20 New York Reps. 531, it was held, that when a court had announced its intention to set aside a conviction and sentence, and to grant a new trial, in a case where the court had no legal authority to set aside a conviction and grant a new trial, prohibition would lie; it was insisted in that case, that the court had jurisdiction of the offence and over the person of the defendant, and that the setting aside of a conviction and sentence, and the granting a new trial, when the court had no legal authority to do so, was simply an error in the proceedings of the court; that errors cannot be re-examined in a writ of prohibition. The court, however, recognized the doctrine, that prohibition lies, when a court is transgressing the bounds prescribed by law, although it be, in handling matters, clearly within its cognizance.

In the case of *D. Haber vs. The Queen of Portugal*, 7 Eng. Law, and Equity, Reps. 340, it was held that no English court has jurisdiction to entertain an action against a foreign Sovereign for anything done, or omitted to be done, by him in his public



capacity as representative of the nation of which he is the head. And that if a party should commence an action in an English court, against a foreign Sovereign, to enforce the payment of a debt, claimed to have been contracted by that Sovereign in his public capacity, prohibition would lie, to prevent such party and the court in which such action was commenced from proceeding further in the case.

Prohibition also lies after judgment, to restrain a court from proceeding to execute a judgment, rendered in excess of jurisdiction.

Therefore, when suit was commenced in a County Court, upon a promissory note, and the defense set up that the consideration for the note was a certain piece of land; that the title was not good, and the consideration of the note had, therefore, failed, and objected, in hearing, to the jurisdiction of the courts on the ground that the County Court had no jurisdiction to determine title to real estate. The judge overruled the objection and gave judgment, and issued execution. It was held that prohibition would lie to restrain the execution of the judgment.

And in a case where the plaintiff's complaint was for a trespass, and the defendant set up title to the premises, upon which it was claimed the trespass was committed, and the judge dismissed the case on the ground that the court had no jurisdiction when title to real estate was involved, and yet rendered judgment against the plaintiff for costs, prohibition was held to lie, to restrain execution, *Lawford vs. Partridge*, 38 E. L. and E., Reps. 493.

In such cases the writ issues to the court, and not to the ministerial officer, in whose hands the execution is placed. For prohibition never lies to a ministerial officer, to stay the execution of process in his hands.

And, again, prohibition does not lie to restrain a court from issuing an execution in a case where the inferior court has not exceeded its jurisdiction in rendering judgment, although it would be illegal and irregular for such court to issue the execution; prohibition being issued to restrain a court from exercising judicial powers only, and not to correct its irregular and erroneous proceedings in matters within its jurisdiction.

Where the inferior court has jurisdiction of the subject matter, and of the parties, but errs in its decision of law, prohibition does not lie. The remedy in such case is by writ of error,

or by appeal. Therefore, although it may appear evident that the inferior court has, on the trial of the case, rejected proper evidence, or has received improper evidence, yet this is not a ground for prohibition.

If, however, an inferior court should construe a statute in such a way as to confer upon such court jurisdiction, under a certain state of facts, and that construction should be held erroneous by the higher court, prohibition would lie to such inferior court, should it undertake to exercise jurisdiction under such state of facts.

The writ is issued on the application of some person who files with the court, written suggestions, or statements, as to the acts and proceedings in the inferior court, and what further proceedings are intended to be had in such court. If the want of jurisdiction in such inferior court appears in the pleadings and papers of the case, a certified copy of such pleadings and proceedings should accompany the suggestions. And if the want of jurisdiction arises by reason of some matter not appearing in the papers and proceedings, these matters should be set forth in the suggestions; and all allegations of fact should be supported by affidavit. When all the facts are within the knowledge of the party making application for the writ, a verification of the suggestions would obviate the necessity of a separate affidavit. But when some of the facts are known by one person, and other facts known by another person, separate affidavits will be required. If the inferior court has jurisdiction of the parties, but not of the subject matter of the action, the defendant should, before moving for a prohibition, appear in the inferior court, and plead the want of jurisdiction, and take the opinion of the court thereon. And in case the inferior court, notwithstanding the plea, determines to hold jurisdiction, prohibition will lie. Pleading want of jurisdiction before motion for prohibition, is the better practice, for two very good reasons. First, it is presumed that if such inferior court is informed, and its attention is called to its want of jurisdiction it will desist from acting in the matter, without any interference from another court. And secondly, that although jurisdiction cannot, generally, be exercised simply upon consent of parties, where jurisdiction does not exist in law, yet there are cases in which consent of parties would be regarded as a waiver of want of jurisdiction; in such cases, if no objection is made to the jurisdiction, in the inferior court, a waiver will be presumed.

Appearance and plea to the jurisdiction, are not, however, absolutely necessary. For when an inferior court has no jurisdiction to entertain a suit, it is not necessary to entitle a party to a prohibition, that he should have there pleaded to the jurisdiction, and that the plea should have been overruled. And especially is this the case, when the court has no jurisdiction over the person of the defendant.

Upon fying the suggestions and affidavits, if the prohibition is moved for on grounds not appearing in the record, it is not usual for the court to grant the writ in the first instance, but to enter a rule against the judge and party, to appear and show cause to the court why a prohibition should not be issued, accompanied with an order that no further proceedings be entertained until the court has passed upon the rule to show cause, a copy of which is served upon them. If on the hearing to show cause, it is clear that the prohibition ought to be granted, the rule is made absolute. But when the party has suggested either matter of fact, or of law, for obtaining the writ, and the question appears to the court doubtful, the party applying is directed to declare in prohibition; that is he is directed to prosecute an action by fying a declaration against the other parties upon a supposition or fiction (which is not transversable) that they have proceeded in the suit below, notwithstanding the writ of prohibition. This action is based upon a fiction; or, in other words upon an allegation of facts which are not true. In order to determine the parties right to a prohibition, he is required to allege that the court has already issued the writ, and that the defendant has wilfully disobeyed it.

As legal fictions are not in these days looked upon with favour, this defect in the common law practice should be cured by legislative enactments.

H. H. MOSES.

Warren, O., June 27th, 1871.

## RE-REGISTRATION OF REAL RIGHTS.

Too great publicity cannot be given to the laws concerning re-registration of real rights. The Quebec *Official Gazette*, in which, by law, the proclamation fixing the date when the re-registration is to be effected, is published, does not reach every person interested, and the consequences may be disastrous to many.

The following explanations may not, therefore, be out of place, especially at the present time, when the delay is about to expire in many places, as, in fact, it already has expired in the Counties of Laprairie and Chambly, and in the St. Ann's Ward of Montreal. Even if they do not give a sufficient explanation of the law in all respects they may, at least, afford such information as will enable those who are interested to understand the importance of giving their immediate attention to the preservation of their rights.

The subject of real rights is, without doubt, the most important in our civil law, if we consider that it secures the rights of those who are incapable of protecting their own interests, and guards the most important transactions with solid guarantees.

Our Civil Code has greatly simplified the registration of real rights, more particularly with regard to those which are connected with the legal hypothec of married women and minors, and also in reference to the alienation of rights of ownership. Consequently lenders and purchasers are now more satisfactorily secured.

Before the Statute of 1841, (4 Vic., c. 30,) purchasers and lenders were forced to rely entirely on the documents produced, whilst, very often, essential documents containing important reserves, might have been concealed by the party selling or borrowing; such, for instance, as a right of usufruct, which was not included in the owner's title, and also any former purchaser's title. For example, a person bought a property, carefully verified the vendor's titles, found them correct, paid the price, and thought himself peaceable proprietor. Suddenly, a former purchaser, who had kept his title secret, and who was not in open possession, claimed the property, and his right was confirmed. By what means could the second purchaser have guarded against

the error wherein he fell? He could not have done it; for there was no publicity or registration of the first purchase. In fact, there was at that time no security against claims, incumbrances, and hypothecs; the purchaser was forced to rely on the good faith of the vendor as to whether he had not before sold the property to another, who was not in open possession, or granted a long lease thereof, and pocketed the rent in advance, or incumbered it in some other way. This state of things could not be tolerated much longer; it became evident that an immediate remedy must be applied. Consequently the Legislature, in order to protect purchasers of real estate, and creditors secured by hypothec, enacted a law to provide against the losses and evils that they so frequently experienced from secret and fraudulent conveyances of real estate, and incumbrances on the same, and from the uncertainty and insecurity of titles to lands in this Province to the manifest injury and occasional ruin of purchasers, creditors and others.

By the above mentioned Statute, 4 Vic., c. 30, coming into force, 31st December, 1841, a law to the above effect was passed, which partly obviated those losses and evils for the future, by providing that a memorial of all deeds, conveyances, notarial obligations, wills, judgments, appointments of tutors, and all privileged and hypothecary rights, claims and incumbrances, whereby any lands, real or immoveable estates in this Province, shall or may be alienated, conveyed, mortgaged or affected, may be registered, and if not registered, shall be adjudged to be inoperative, void, and of no effect against any subsequent *bonâ fide* purchaser, mortgagee, or hypothecary creditor or incumbrancer.

The inconvenience and difficulty of ascertaining the rights of the wife against the property of her husband, and the rights of the minor against that of his tutor, were not, however, overcome by the 4 Vic., c. 30, inasmuch as the wife and minor had a *general* legal hypothec on the whole property of the husband and tutor respectively; a registered judgment also affected the whole of the property of the debtor belonging to him at the date of such judgment. But the purchaser or creditor had nevertheless the satisfaction of being informed of the existence of these rights by the Registration of the marriage contract, tutorship, judgment, etc., and was therefore induced to make the proper inquiries.

Experience soon showed that the general hypothec was an inconvenient and inexpedient restraint and burden on the aliena-

tion of real estate and an obstacle to the introduction of foreign capital, by causing delays and heavy expenses in making the necessary searches, and examining the necessary documents; and, above all, the liability of being deceived by approximate calculations which had to be made as to the amount of general hypothecs. This was the reason for enacting the Statute 23 Vic., c. 59, which came into force in 1860, being an Act for the protection of purchasers of real property, and to facilitate the introduction of capital into Lower Canada; in pursuance of which the general legal and tacit hypothec created by, or arising out of, a judgment rendered *tutelle*, *curatelle*, or any matrimonial rights, instrument, or document executed, or any appointment (of Tutor or Curator) made, or any act or thing done, happening, or registered after that Act came into force, does not bind or affect any real property, unless and until a notice has been filed with the Registrar specifying and sufficiently describing such property, and stating it to be then in the possession of the party against whom such hypothec is registered as his property. Therefore, no property can be affected to the prejudice of third parties; viz., any persons acquiring the same, or registering any hypothec thereon for any right they may have. For instance, A. owns a property; he is married to B., who holds a claim for a matrimonial right, but not registered with a special hypothec on that property. A. sells it to C., who makes the necessary search, and finds nothing registered specially affecting that property. C., the purchaser, therefore, remains undisturbed and unmolested in his possession, B. having forfeited her right by not making the necessary registration. The same example will sufficiently illustrate the case of a tutor selling his property, against which no special hypothec in favour of the minor has been registered.

By Sec. 29 of the same statute it is enacted that the Commissioner of Crown Lands shall cause to be prepared a correct plan of each city, village, parish, &c., in each registration division in Lower Canada.

All those Statutes are fused into the Civil Code, which is in force since the 1st of August, 1866, and in which are included several changes and additions, to be found below among the detailed rights subject to registration; particularly the *obligation* to register the right of ownership before selling, hypothecating, or otherwise encumbering any real estate. The registration of, transmission of real estate by succession, and the registration of the legal customary dower (by Articles 2098 and 2116).

By Article 2168 of the Civil Code, it is provided that as soon as the plans and books of reference for a registration division, (or for any ward in a city, Stat. of Quebec 1870) have been deposited with the Registrar, and notice has been given by proclamation of such deposit, the number given to a lot upon the plan and in the book of reference is the true description of such lot, and no other description will be deemed sufficient, and the registration of any deed not containing the necessary description by number does not affect the lot in question.

By Article 2172, within eighteen months after the proclamation, the registration of any real rights upon any lot of land within the division or ward so proclaimed must be renewed by means of the registry at length, of a notice describing the property affected by the first registration by the number it bears on the official plans. By Article 2173, if such renewal be not effected, the real rights preserved by the first registration have no effect against other creditors and subsequent purchasers whose claims have been regularly registered.

The words "real rights" used in the Code (instead of hypothecs, as in the Statutes) is a general term understood to comprehend all rights, without exception, which can attach to immoveable property; therefore in pursuance of this Article (2173) any person acquiring since the date of the promulgation of the Code, 1st August, 1866, against an immoveable property or real estate a right of possession, usufruct, redemption, conventional or legal hypothec, or any other real right, is bound to re-register the same in the manner above referred to within the delay of eighteen months from the day fixed by the proclamation; otherwise he may lose his priority of claim, or even lose his real right altogether, against a subsequent purchaser or creditor who may have registered. Take the example of a creditor holding a mortgage. A owns a property worth \$1,400, he gives a mortgage to B for \$700 thereon, which is registered before the proclamation, and afterwards a second mortgage for a like amount to C, which is also registered before the proclamation. B neglects to re-register his mortgage during the eighteen months, while C conforms to the requirements of the law. C, the second mortgagee or creditor, has a right to claim preference, and should he bring the property to sheriff's sale, and the property be sold at less than its value, say \$1,000, he will receive his \$700, in full, and B will receive the balance after deduction of the costs. In confirmation of this, we refer to the

judgment rendered lately in the Court of Appeals (Queen's Bench) in a case of Bourrassa, appellant, and McDonald, respondent (the property is situated in Lapraire where the term limited by proclamation had already expired). In this case Bourrassa who held a hypothec on a certain property renewed its registration before the eighteen months delay expired, and McDonald who held a *bailleur de fonds* claim, did not, for the reason that during the eighteen months the property was in the hands of the Sheriff. His Honour Chief Justice Duval with the majority of the Court ruled that Bourrassa having registered within the time prescribed by law was entitled to rank by preference over McDonald. The fact that the property was under seizure could not deprive Bourrassa of the rights which the law gave him; the judgment of the Court therefore sustained his claim of priority, on the sole ground that he had re-registered while McDonald had not.

Many seem, nevertheless, to be in doubt whether the owner of a property, who was in actual possession before the Code, must register the deed or title conveying to him the ownership, and also whether such purchaser, who has registered his title, must renew such registration made before the Code came into force. It would seem to be necessary for every purchaser, since 1866, (August 1st) if we adhere strictly to the terms of Article 2098, which provides that all acts conveying ownership must be registered, or in default of such registration, the title of conveyance cannot be invoked against a third party who has purchased the same property from the same vendor for a valuable consideration, and whose title is registered, and that so long as the right of the purchaser has not been registered, all conveyances, transfers, hypothecs or real rights granted by him in respect of such immoveable, are without effect; and Article 2173, which provides that if the renewal be not effected, the real rights preserved by the first Registration have no effect against other creditors, and subsequent purchasers whose claims have been regularly registered. Let us suppose the case of a person who sells one and the same property to two separate purchasers at separate times, (or that the vendor's heir sold it to the second purchaser,) will not the latter purchaser, if he has regularly registered his title, and renewed its re-registration during the eighteen months' delay, be in a position to give a good title to any future purchaser?

I am inclined to think that he would, and, in fact, he should



be able to do so, after failing to discover any trace of contrary title upon a search against the particular number of the property on the official plans and books of reference during the period of eighteen months, and after finding the vendor's title duly re-registered; or, in other words, if the purchaser is secure against all mortgages, which are not re-registered, why should he not be secure against a presumed proprietor who has not conformed to the law, which was certainly intended to protect the purchaser, not only against mortgages, but also against claims of ownership as well as real rights of any other nature. With regard to purchasers before the Code, several gentlemen of high standing in the legal profession, with whom I have had occasion to discuss this point, are of opinion that purchasers, before the 1st of August, 1866, who took immediate and open possession of the real estate bought by them, not being then obliged to register their title, are not obliged either to register or re-register now; that purchasers before the above date who did not take open and immediate possession, such as purchasers of wild lands, who were bound to register in order to secure their title, are now bound to renew such registration; and that all purchasers since 1st August, 1866, are bound to register and renew.

Many have already attended to the re-registration of their real rights, but there are, in all probability, a greater number who have hitherto neglected it, for the simple reason that they have not been sufficiently informed.

The notice (by proclamation in the *Official Gazette*) has been given for the following Counties and Wards, and the time for re-registration will be within the following dates:—

County of Laprairie.....	time expired
County of Chambly.....	time expired
St. Ann's Ward, Montreal, from 3rd January, 1870, to 3rd July, 1871	
St. Antoine Ward, " " 1st Sept., 1870, to 1st March, 1872	
St. Lawrence Ward, " " " " " "	
West Ward, " " " " " "	
Centre Ward, " " " " " "	
East Ward, " " 31st Jan., 1871, to 31st July, 1872	
Jacques Cartier Ward, Quebec, " " " "	

N. B.—The proclamation for the remaining wards of the City of Montreal is expected to issue within a short time; the plans having, in most cases, been already forwarded to the Crown Lands Department.

The following deeds, acts and real rights, are those of most usual and common occurrence, which are subject to registration, and in most instances to re-registration, if they have been registered before the period fixed by the proclamation. (Of course mortgages which are to be paid before the expiration of the eighteen months, need not be re-registered; to do so would be a useless expense.) Their enumeration may lead the reader to see at a glance what rights and titles he may need to re-register:—

All deeds giving a security on real estate, or encumbering real estate in any way.

All deeds conveying ownership in immoveable property, by sale, exchange, gift, &c., (within thirty days after their execution.)

The transmission of property by succession, and every conveyance by will (six months), (and three years for absentees.)

Judgments cancelling a registered title.

The privilege of a builder, thirty days after the acceptance of the work.

The privilege of copartitioners (thirty days after the deed of partition.)

Creditors claiming separation of property, preserve upon the estate of their deceased debtor against the creditors of the heirs, by registering the rights which they have against the succession, within six months after the death of the debtor.

Fiduciary substitutions, in respect of immoveables in deeds of gift, (thirty days.)

The legal hypothec of the wife on the immoveables of her husband, including the legal customary dower, according to Article 2116 of the Code.

Tutors to minors and curators to interdicted persons are bound to register without delay the hypothecs to which their real property is subject, under pain of punishment for misdemeanor, and of being liable for all damages. Married men who do not without delay register the hypothecs or incumbrances against their estate in favour of their wife, incur the same penalty. (The hypothec of minors and interdicted persons against their tutors and curators affect only such real property as is specified in the act of tutorship or in a notice to the registrar.)

Judgments and judicial acts of Civil Courts, when registered create hypothec from the date only of the registration of a notice

specifying and describing the real property of the debtor upon which the creditor intends to exercise his hypothec.

Claims for accrued interest for over 5 years in cases of sale and of life rents, and over 2 years in other cases.

Every transfer of a mortgage or hypothecary claim immediately and specially before the signification of the transfer: (this provides against persons running the risk of being deceived by anterior transfers of which they were ignorant.)

The lease of an immoveable for a period exceeding one year cannot be invoked against a subsequent purchaser unless registered.

With the obligation of re-registration of all real rights and the obligation of specifying the property on which the mortgage, hypothec or real right is to take effect, we are protected against claims which could not be fully ascertained under the old system ;—And the facility of searching against any property which will be hereafter designated by a particular number, under which number all entries are to be made in the registrar's books, will prove to be very advantageous to those transacting in real estate by enabling them to ascertain more promptly and satisfactorily the incumbrances upon any property.

A registration law, however, can scarcely be enacted to provide satisfactorily for such cases as the following: viz., The case of a vendor selling the same property to two different purchasers. (In this case the first registered deed takes preference.)

The case of a creditor who lends to a tutor when the property is affected by the legal hypothec of the minor. He has no means of ascertaining the amount for which the tutor may be indebted for the balance of the tutorship account, *reliquat de compte* if the account has not yet been rendered, the tutor's administration not being a public matter. (In this case security should be obtained from a vendor whose property is thus affected.)

The present system of re-registration of real rights is remarkable for its simplicity. It is however a matter of regret that the Legislature has not deemed it advisable to compel the registration of real rights such as Customary Dower and other matrimonial right, which were created prior to 1860 and may affect immoveables at the present time.

Registrars are bound to keep an Index for the number of each lot, and under such number is made every entry respecting such lot. A person wishing to ascertain what real rights affect the

property corresponding to the number by which it is designated, can, upon opening the book, at once discover what encumbrances and rights are registered against it, thus relieving him from the necessity of waiting weeks, and sometimes months, for a certificate of search.

The law provides for errors and omissions in the plans and books of reference, and if any are found in the description or dimensions of a lot or parcel of land or in the name of the owner, it must be reported to the Commissioner of Crown Lands, who may, when the case requires it, correct the original and the copy, and certify such correction.

Such corrections are, however, to be made without changing the number of the lots, and in case of omission of a lot, it must on insertion be distinguished by a letter so as not to interfere with the original numbering.

No right of ownership, however, can be affected by any such errors, nor can any error of description, dimensions or name be interpreted so to give any person a better right to his land than his title gives him.

Mr. Sicotte, Secretary to the *cadastration*, has prepared a special book of reference, containing the measurement of every property in this city, with the name of owner and number of lot in conformity with the plan and book of reference; it will be found indispensable to the creditor or purchaser as a key for immediate reference to the registers.

P. E. NORMANDEAU,  
*Notary Public.*

MONTREAL, 8th July, 1871.

LA JURISPRUDENCE COMPARÉE DE LA COUR  
D'APPEL.

Le résumé de décisions publié par la *Revue*, dans son dernier numéro, sous le titre de *Jurisprudence comparée de la Cour d'Appel*, a fait plus de bruit, qu'il n'était, dans la pensée de ses auteurs, destiné à en produire. Les Honorables Juges, dont les décisions ont été ainsi mises en regard les unes des autres, en ont témoigné publiquement leur mécontentement, à plusieurs reprises, pendant le dernier terme de la Cour d'Appel, et ont réclamé contre de nombreuses erreurs que contiendrait cet article, suivant eux, sans cependant en signaler aucune en particulier. D'un autre côté la publication de ce travail a fourni à la presse quotidienne, un prétexte plus ou moins plausible pour faire sur l'administration de la justice en général et sur le compte des juges de la Cour d'Appel en particulier, des commentaires dont les rédacteurs de cette *Revue* ne doivent pas accepter la responsabilité. C'est donc pour nous un devoir, dans de telles circonstances, de fixer le sens et la portée de l'article qui a fait le sujet de tant de commentaires, afin que par des interprétations plus ou moins exagérées, on ne nous fasse pas dépasser la limite que nous avons cependant cru devoir atteindre.

Disons d'abord qu'il n'est jamais venu à la pensée des rédacteurs de cette *Revue*, en publiant ce travail, de manquer en quoi que ce soit au respect et à la considération dus à la magistrature de ce pays. C'est donc avec un profond regret que nous avons entendu un des Honorable Juges de la Cour d'Appel, mettre en suspicion les motifs des auteurs de l'article en question ; car convaincus, comme nous l'étions, que le public éclairé et tout spécial auquel s'adresse cette *Revue*, ne se méprendrait pas sur la portée de notre article, nous avons été fort surpris de voir que grâce à une susceptibilité louable peut-être, mais exagérée, l'on pût ainsi attribuer exclusivement au personnel de la Cour ce qui était aussi destiné à faire ressortir les vices du système judiciaire lui-même.

Il nous serait certainement difficile d'indiquer ici, et dans un seul article, les changements indispensables, les réformes urgentes, que requiert l'administration de la justice en Canada. Ce sera là le sujet de plus longues et plus nombreuses études. Néanmoins,

la publication de notre article a déjà eu pour résultat de faire ouvrir les yeux à bien des gens, de les forcer de réfléchir et d'observer que si parmi les arrêts d'un tribunal, le premier du pays, on peut relever de telles contradictions, il doit y avoir défectuosité dans le système même qui expose la justice à de semblables conséquences.

L'Honorable Juge qui a paru le plus blessé de la publication de l'article en question, a lui-même indiqué deux des vices de ce système (que notre article avait en vue de faire ressortir), en déclarant que ces prétendues contradictions n'existaient réellement pas, et que si les faits de chaque cause mise en regard par la *Revue*, avaient été étudiés, il aurait été facile de voir que chaque cas étant dominé par des circonstances différentes, la conclusion devait nécessairement y être différente aussi.

Sans vouloir accepter complètement l'espèce de rectification que voulait par là nous imposer l'honorable juge, car nous devons à la vérité de maintenir qu'il y a réellement dans les décisions publiées des contradictions que rien ne justifie, nous pouvons dire cependant qu'il est fort possible, que si les jugements, non seulement de la Cour d'Appel mais de toutes nos Cours, étaient motivés comme ils devraient l'être, et si nous avions des rapports officiels des arrêts de nos tribunaux, non seulement beaucoup des contradictions que nous avons signalées s'expliqueraient, mais nous dirons même que dans les cas où elles ne pourraient pas s'expliquer, le tribunal mis sur ses gardes, par la double garantie que nous demandons, aurait certainement évité les autres.

L'Article 472 du Code de Procédure dit :

“ Le jugement doit contenir les causes de la demande et doit être susceptible d'exécution.”

“ S'il y a eu contestation, le jugement doit en outre contenir un sommaire des points de droit et de fait soulevés et jugés, ainsi que des motifs de la décision, avec mention du juge qui l'a rendu.”

C'est certainement là un des articles les plus importants de notre Code de Procédure ; car c'est celui qui devrait donner au plaideur la certitude que son procès ne sera jugé qu'après une étude complète et mûrie des faits et du droit. Et cependant comment cet article est-il mis en force dans la plupart des cas ? Combien y a-t-il de jugements de nos tribunaux qui contiennent un exposé des points de faits ? Nous serions tentés de répondre qu'il n'y en a pas un seul, si nous ne consultions que notre propre

expérience. Combien y a-t-il maintenant d'arrêts de nos Cours qui ne contiennent aucun exposé quelconque *des points de droit soulevés* ? Le nombre en est infini. Tous les jours, des jugements sont portés en appel, sur ce motif simple et commode :

“ Considérant que le demandeur n'a pas prouvé les allégations matérielles de sa déclaration, La Cour déboute, etc.”

Et la Cour d'Appel, confirme dans les termes suivants :  
“ Considérant qu'il n'y a pas d'erreur dans le jugement dont est appel, confirme, etc.”

Le plaideur ruiné par un semblable jugement a-t-il au moins la conviction morale que les juges ont parfaitement saisi et compris tous les points de sa cause, qu'ils les ont appréciés et jugés ? Nullement, et souvent même il peut en outre se plaindre d'avoir été jugé sur une question qu'il n'avait pas prévue, que son adversaire n'avait pas soulevée et sur laquelle il n'a jamais eu l'occasion d'être entendu.

Qui ne voit cependant combien cette disposition de la loi, que nous venons de citer, est sage et nécessaire ? Le juge qui prend la peine d'écrire un résumé des faits d'une cause, d'en exposer ensuite les questions de droit, et de donner enfin les motifs de sa décision, se trompe rarement ; et s'il se trompe, son jugement a encore l'avantage de pouvoir être présenté au tribunal supérieur dans la forme la plus avantageuse, la plus claire et la plus satisfaisante et pour celui qui l'a rendu et pour celui qui l'a obtenu. C'est une garantie de plus pour le plaideur heureux et c'est toujours une satisfaction pour celui qui a succombé dans la lutte, car si les motifs de l'arrêt qui le condamne sont bons, il sera souvent convaincu de son tort, sans encourir le risque d'une nouvelle tentative devant un tribunal supérieur.

Comment cette pratique *illégal*e, pour ne pas dire plus, de ne résumer les faits et de n'exposer les points de droit que très rarement dans les jugements de nos Cours, et quelques fois même de ne faire ni l'un ni l'autre, a-t-elle pu s'introduire dans nos tribunaux, c'est ce que nous n'avons jamais pu comprendre. Car il suffit d'ouvrir n'importe quel volume du Journal du Palais, de Dalloz, de Sirey, etc., pour voir avec quel soin la règle qui nous régit sous ce rapport et qui existe pareillement en France, est scrupuleusement suivie dans ce dernier pays. Il n'y a pas un arrêt rapporté dans ces grandes collections, qui ne contienne avec une précision, une exactitude et une concision admirables, l'exposé des faits et du droit de chaque cause, et les motifs au long de la décision du juge.

Il est sans doute beaucoup plus facile de se dispenser de ce travail, et l'on dira peut-être que souvent le résultat n'en est pas plus mauvais. Nous sommes convaincus du contraire, et nous croyons qu'à part la grave responsabilité qu'assument ceux qui rendent de semblables jugements au mépris de la loi et de leur devoir, il y a là une question des plus sérieuse et des plus importante pour la bonne administration de la justice. La seconde réforme que nous avons indiquée ci-dessus, serait la publication de rapports officiels des causes décidées par chaque Cour, sous le contrôle même du juge ou des juges qui auraient rendu le jugement. Ce serait le complément de la première réforme, et rien ne serait plus propre à assurer la fixité de notre jurisprudence. Il y a aujourd'hui de ces rapports dans beaucoup de pays, et ils ont tous une valeur et une importance chaque jour plus considérable. La province d'Ontario elle-même a sur nous cet avantage, et il serait bon de suivre en cela l'exemple qu'elle nous donne.

LA RÉDACTION.

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N. B.—L'abondance des matières nous force de remettre à la prochaine livraison, le sommaire des décisions récentes, ainsi que plusieurs articles qui nous ont été adressés.



# REVUE CRITIQUE

DE

## *Législation et de Jurisprudence.*

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### THE HISTORY AND SUCCESS OF LAW REFORM THROUGH THE AGENCY OF LEGISLATION IN THE UNITED STATES.

BY ISAAC F. REDFIELD.

The following is the substance of a letter addressed to one of the most eminent jurists and among the highest judicial officers in England. It was prepared with care, and we believe the statements of fact to be reliable. It will not be necessary to advertise the reader that our early admiration of law reform, and of that especial form of it known by the name of codification, has long since given place to the most unquestionable conviction that, practically, it has no existence in fact; and that, speculatively, it is of no use, further than it affords a nucleus for good purposes to cluster around in early life, and finally, when experience has begun to show the folly of our youthful hopes and aspirations, it may afford some consolation to those who have adventured in the work in assuring themselves of having at least attempted something good. It is, unquestionably, an amiable hope; an innocent dream; a somewhat pleasurable delusion,—but, at the same time, none the less a dream and a delusion. It is not like the philosopher's stone, the universal solvent, or the quadrature of the circle, a mere idle and useless speculation, impossible of attainment, and equally impossible of being turned to any practical end if attained. The perfection of the jurisprudence of any country may always be regarded as of the highest value and importance; an end to justify the most intense striving, the most persistent and invincible efforts; but unfortunately one

which is no more possible of attainment by any short-hand process, than is strength or wisdom or power in the individual man. All things come and go, or abide in one stay, only by the appointment of the omnipotent power and wisdom of Him, who ruleth in the armies of heaven and among the inhabitants of the earth as seemeth Him good; with whom a thousand years are as one day, and one day as a thousand years. But with man everything lies in mere experiment; is merely tentative, except as it is confirmed by the procession of events, and can only be fully established by the advancing ages of the world, we might almost say, of eternity itself.

It may be proper to say that the letter was written at the request of the person to whom it was addressed, in June, 1870.

I have ventured to give a brief outline of the history and success of Legal Reform in the United States.

The earliest attempt at codification in the United States was made by the legislature of the State of Louisiana, in the year 1822, by the appointment of Edward Livingston and two others, to prepare a civil code for the State, to embrace all laws then in force, including the law merchant and a code of practice. Their report, under the title of "The Civil Code of the State of Louisiana," was adopted and promulgated by the legislature in the year 1824. The legislature resolved that thereupon all former laws should cease to have operation "in every case for which it has been specially provided in this code." It would therefore seem that the old law was still in force in all cases not specially provided for by the new code. This code is drawn largely from Toullier's "Le Droit Civil Français" and the Code Napoleon, as these were from the Code of Justinian and the commentaries upon the Roman Civil Law.

This is the only attempt at the codification of the entire civil law of a State, which has met with such acceptance as to be adopted by the legislature. And I believe the adoption of this code by the State of Louisiana is largely attributable to the fact, that the State was chiefly settled by Spanish and French emigrants, who had always been accustomed to that mode of legislation, and to the further fact that a species of code already existed in the State.

The legislature of this State in 1822 also appointed Mr. Livingston to prepare a code of criminal law, embracing procedure and evidence. This latter code was prepared by the dis-

tinguished commissioner ; and presented to the legislature in 1822 but its adoption being delayed, it was destroyed by fire in 1824. Mr. Livingston was afterwards employed to reproduce it, but it seems never to have been adopted as the law of the State, although it was published by Congress and extensively circulated, and is said to have formed the basis of the criminal codes of some of the Mexican and Central American States, whose people were of Latin origin. This is probably the most complete and perfect code which has ever been produced in America ; but for some reason the people of the State of Louisiana have never felt prepared to take the bold step of an entire change of its criminal law, by its adoption.

The earliest attempt at codification in any of the American States where the common law of England prevails, was made by the State of New York in 1830, by appointing three of their most eminent men, John C. Spencer among the number, as commissioners to revise the statutes of the State. This was soon after accomplished, and the code adopted. But these revised statutes do not embrace entire anything more than the statute laws of the State. They naturally embrace some changes, both by way of addition and alteration, and commonly include most of the authoritative judicial constructions of former statutes. The same plan has been adopted in most of the other States, and is found a very great convenience in bringing all the statute laws of the State into one body, so as to be readily accessible.

My own experience of the practical working of attempts at codification has been restricted to these Revised Statutes. That process was resorted to in the State of Vermont, while I was connected with the Supreme Court of that State. The result did not impress me favourably in regard to any actual improvement in the statutes, by reducing them to a formal code, either in regard to certainty or completeness. The Commissioners for presenting the draught of the revision consulted the statutes of other States, and incorporated many new provisions into their report, and altered some of the existing ones, and changed the phraseology in many instances, either for greater certainty or symmetry, but in almost every instance produced many times more uncertainty than they cured, and in some instances resorted to such refinements of language, as might seem more suitable to other writings than to the statutes of a State. The highest judicial tribunal of the State was, more or less, occupied for many years in removing the

uncertainties created by these "improvements in language." I am thoroughly convinced that after a statute has received repeated judicial constructions, if it is intended to be substantially preserved, it is not wise to change its phraseology, however much it may seem to increase its clearness or beauty. I think, therefore, that while revisions or concentrations of the statutes of a State after they become considerably numerous, is of the last importance, for the convenience of those who desire to consult them; it should, nevertheless, so far as practicable, always be done with the strictest adherence to existing phraseology. And I think the American States are now, very generally, arranging their existing statutes, upon the same topics in successive chapters or subdivisions, so as to bring the entire body of the statute law, from time to time, into one homogeneous form, which are now called compilations, or General Statutes, and sometimes Codes; but under whatever name are in fact nothing more than reducing the scattered statutes into one compact and systematic body. It has always seemed to me the greatest cause of surprise of anything in regard to Law Reform in England, that in the multiplicity of projects upon the subject, some one should not only have attempted but accomplished a compilation of existing statutes, arranged according to topics, with the repealed and obsolete ones excluded. No book, it seems to me, would be easier of accomplishment, or of greater utility to the profession there.

It may be proper to mention that the law of the American States upon some subjects has been of a statutory character from the first; as in regard to the conveyance of the title of lands and the registry of such titles. This resulted almost of necessity from the fact that all our land titles are strictly of an allodial character, there never having existed in this country any of the accompaniments of feudal tenure. These statutory provisions upon this and upon some other subjects, have assumed in the course of years very much the form of codes, but nevertheless more or less supplemented by reference to the English common law. Thus, for instance, the codes upon conveyancing in the American States, for the most part, I believe, define the nature and form of the instruments to be executed by the grantor, or the grantee, or both, for the purpose of transferring the title. But the precise force and effect of such instruments, and the particular title conveyed, is not uncommonly referred to the doctrines and definitions of the English common law. For instance, the estate conveyed

by the use of particular words, whether a fee simple or in tail; whether an estate for life in the first grantee, and a remainder in fee to his heirs, or an absolute fee simple in the first grantee; whether an estate in joint tenancy, or a tenancy in common; and many other questions of like character have to be referred to the definitions of the common law. We hear almost as much of the rule in Shelley's case here as you do in Westminster Hall.

And the whole law of pleading and procedure in all respects, has in the American States been held more or less under the control of the legislature, from the first. And while pleading has been made more special, by legislation, in England, it has constantly been made less so in America. So that here, for many years, it was competent, in all forms of civil action, even trespass, to give all special defences in evidence under the general issue, by filing with the plea of the general issue, a notice of the special matter proposed to be given in evidence under it, which notice must contain the substance of a plea in bar, but without its formal averments.

There are many other subjects, where the American law has become essentially modified by our peculiar circumstances and condition, and where it is essentially statutory. But in all these cases the common law of England or the rules of equity jurisprudence, as the case may be, may be brought in to supply any defects existing in regard to the provisions of the statutes. So that upon all subjects, and in all forms of statutory enactment, they are merely supplementary and reformatory; much like the acts of the British parliament for many generations past. And to this extent all must agree that legislative reforms are indispensable in all free States. And it seems to me that this admitted necessity of statutory amendments of the common law, within certain limits, has led many enthusiasts, and many perhaps who are not altogether of that character, to entertain the belief or the hope that, by careful study and revision, a more complete and perfect system of laws might be created, than any now existing. I shall not stop to discuss a proposition so abstract, and so incapable of being reduced to any decisive test, through the agency of mere logic. It may be so. It would seem that it might be. Many very wise and prudent men believe it is so. But for some reason there seems to be an aversion to try the experiment, with almost all communities of the Anglo-Saxon race. There is among them an attachment to the system of unwritten law, or customary

law, as a supplement to statutory law, which seems almost invincible. The speculative and the ambitious feel great confidence in law reform, through statutory enactments, in the form of complete codes; but the mass of the people prefer to "endure the ills they have, rather than fly to those they know not of."

I shall now content myself, in conclusion, in giving a brief history of the attempts at legal reform in the great State of New York for the last twenty-five years, inasmuch as that is the only state in our country, having the common law of England as the basis of its jurisprudence, which has made any very decided attempts to reduce the whole body of its law to a code. The constitution of this State adopted in 1846, was essentially a revolutionary movement, and altogether in the interest of what is called Law Reform, and under the lead of the most advanced movers in that direction. It began with the complete fusion of Law and Equity. It converted the old system of courts, based upon the principle of circuits throughout the State for the trial of facts, and central session in banc for settling the law, much after the English system, into eight independent local supreme courts, holding their sessions, each for itself, both at *nisi prius* and in *banc*, and deciding everything on full argument, with the right of appeal upon all questions of law, to a grand court of Appeal, consisting of eight judges, one half elected specially from the State at large for that particular tribunal, and the other half taken from the local supreme courts, of the class of those who had served the longest term, and whose remaining term soonest expired. This added about twenty judges to the number formerly employed, and by a judicious distribution of candidates throughout the State, and referring the elections to the people, by general ballot, and limiting the period of holding office to a comparatively short term, secured the adoption of the constitution, by an overwhelming majority. I believe that every able lawyer, and almost every fair-minded man in the State, will now admit, that the administration of justice has never been as able or as impartial, under the new constitution, as under the former ones, where the judges held office, *dum bene se gesserint*, and were far less numerous. But some may claim an advantage, because, if the administration of justice has not been improved in quality, it certainly has been somewhat increased in quantity. But it seems very questionable, how far bringing justice to every man's door is always a benefit. It is always best one should feel that justice

is not beyond his reach ; but not always, that its awards may be too cheaply attained. It should not be "denied, or deferred, or sold," but may be made too cheap.

The legal reforms required by this new constitution, were numerous, and of a most radical character. It was made the duty of the first legislature convened under the new constitution, to appoint three Commissioners, whose duty it should be to reduce into a written and systematic code, the whole body of the law, or such parts thereof as to the Commissioners should seem practicable and expedient. The Commissioners were also charged with the further duty "to revise, reform, simplify and abridge the rules of practice, pleadings, forms and proceedings of the courts of record." The legislature in 1847 created two commissions, one in reference to procedure, and the other as to the general law of the State. The former made a preliminary or provisional report in 1848, in order to meet the pressing emergency of the fusion of law and equity ; which was immediately enacted by the legislature, and with subsequent amendments, forms the present code of practice in that State, which is the only code the State has ever adopted ; and this has been somewhat extensively adopted in other States. It is rather a significant fact in this connection that this only American code, in any State where the common law of England obtains, was confessedly a hasty and imperfect effort ; prepared without study and adopted without deliberation ; and that the final and mature work of the Commission was never acted upon by the legislature ; and that this one code has reference exclusively to procedure and practice, and was rendered indispensable by the foregone action of the constitution in the complete and irrevocable fusion of law and equity. It could answer no good purpose to speculate upon the grounds of this singular action, or rather inaction, on the part of the legislature. It could result from no want of agitation and advocacy on the part of the reformers ; for they have always been active and persistent and loud in their demands ; but never able to accomplish any other approach towards codification, except this hasty fragment entirely upon compulsion, by the prior and irreversible action of the constitution. It certainly indicates extreme distrust of reforming the body of the law, by means of the labours of learned jurists and wise and experienced statesmen. For it is undeniable that many of the most learned and most experienced of the American bar have been, first and last, connected with the

New York Commissions for preparing its codes, and, who have laboured, long and patiently, to produce codes of great wisdom and learning. But for some reason, no legislature has ever been found willing to adopt them, with the single exception already named, of the provisional Code of Practice. The first Commission appointed in 1847 to reduce the whole body of the law of the State to a code, consisted of Chancellor Walworth and two others. Chancellor Walworth, far the most eminent of the number, immediately resigned and another was appointed in his place; but no report was ever made by the Commission. Nicholas Hill too, the ablest man upon the former Commission of procedure and practice, immediately resigned, and his place was filled by another. A new Commission was appointed in 1849, consisting of John C. Spencer, another very eminent jurist and statesman, and two others, but that law was repealed in 1850 and no report was ever made. Thus the matter slumbered until 1857, when a new Commission was appointed, consisting of Messrs. Field, Noyes and Bradford, who were expressly required to serve, if at all, without compensation, and these gentlemen being all in large practice in the Courts of the City of New York, after devoting, what leisure they could command for many years, have produced and published all the memorials of New York codification which still abide, with the exception above. None of them have ever become laws. They cover the entire ground of the law of the State, but do not profess to supersede the old law, *except* to the extent of the express provisions contained therein. It is certainly a very significant fact in connection with the attempts at law reform in this country, by way of codification, that it has resulted in accomplishing so very little, almost nothing at all, during the period of almost two generations, while the work has been hotly pressed by many ardent and persuasive advocates and earnest laborers.

I shall not be expected to discuss the merits or the hopefulness of the subject of Law Reform in this country. The long period which has elapsed and the numerous attempts which have been made, and the all but total failure of all of them, speak a language more significant than any other which could be uttered. If after a struggle of nearly fifty years absolutely nothing in that direction has been accomplished, under such favorable circumstances and with such persevering efforts, he must be a sanguine man indeed, who looks to the future with much hopefulness. There



are doubtless many apologies for this want of success hitherto, which the advocates of codification might urge. But we fear most of the obstructions would be found difficult, if not impossible to be removed.

It is unquestionably true that the real work devoted to the undertaking in New York has never been at all in proportion to the result proposed to be accomplished. A very friendly review of the work of the last Board of Commissioners in New York in the May number of the *London Law Review*, points so many and some such puerile defects and deficiencies in the work that it would be useless to attempt anything further of that character. The whole subject of Trusts is disposed of in the space of fourteen pages, and the subject of Charitable Trusts is not touched! And many other important subjects are handled in the same brief and summary mode, so that the writer just referred to very naturally concludes that if the work ever should be adopted by the legislature, while it may be useful to students as an elementary text book, and possibly to laymen desiring some knowledge of the elementary principles of the law, nevertheless that to the practitioners, except so far as it effects changes in the existing law, it must prove "absolutely useless."

But in saying this we beg not to be misunderstood. We by no means intend to depreciate the eminent fitness of those distinguished members of the New York bar for the difficult task which they took in hand. The difficulty was doubtless more in the work and in their want of leisure to devote to it than in the men. But one may conjecture that these gentlemen were very little aware of the extent and difficulty of the undertaking at the time they entered upon the work. I think it fair to conclude that any body of men able to comprehend the extent and difficulty of reducing the entire body of the Common Law of England to a single code with all the modifications it had received in that State by statute, for this was the work proposed to be done by them, and who really had mastered that comprehension, would not have announced their purpose in quite the same high sounding phraseology as that adopted by this Commission in their acceptance of the trust; wherein they declare the humble purpose of presenting to the legislature, "in a condensed and convenient form, the great body of the law, not the laws of England, nor the laws of France, nor yet of Rome, but the laws of the foremost American commonwealth, formed out of those which

were brought in by our ancestors, and those which have sprung from the genius and wants of our own land." When we compare this high-sounding manifesto with the actual results of the undertaking, we are reminded of the language of the English dramatist put into the mouth of Queen Katharine in regard to Cardinal Wolsey, "His promises were as he then was, mighty. But his performances as he is now, nothing."

Such is the brief but faithful history of Law Reform in the American States. It does not, in fact, extend beyond reducing the statute law to something like a code. And even this the national legislature has been never able to accomplish. It has made some attempts in that direction, several Commissions have been appointed, but no report has ever been made, or no complete report, and there is a kind of ominous intimation from those professing to be informed in the matter, that nothing has ever been done. And some are so cynical as to suggest that the less the better! upon the principle that no work is better than bad work. But I expect the statute law of Congress will soon be reduced to uniformity.

I ought perhaps in conclusion to say, in fairness, that from setting out in life as a rather confident believer in Law Reform, through the instrumentality of codes, I have come to believe that the thing, if not altogether impracticable among us, where there is not sufficient leisure to do anything carefully and thoroughly, is certainly not hopeful, and that the less legislation we have, the better for our jurisprudence, since what is done must be done in haste. Just to reflect upon a code for the empire State of New York, made by three counsellors in full practice at the bar all the time, in their fragments of leisure from severe toils; and that code disposing of subjects in ten or twenty pages, where reported cases on the topic are already numbered by scores, and in some cases by hundreds! The thing is simply preposterous.

## DE L'INEXÉCUTION DES OBLIGATIONS.

Toute obligation constitue pour celui qui en est tenu, une restriction de sa liberté naturelle. Sans elle il pourrait s'abstenir d'un certain acte ou le faire ; à cause d'elle il ne le peut plus qu'avec le bon plaisir de son créancier. Elle l'a mis dans la dépendance de celui-ci. Il se trouve astreint par la loi civile à faire cet acte ou à s'en abstenir.

Les auteurs appellent *prestation*, l'acte ou l'abstention à l'égard desquels la liberté du débiteur se trouve ainsi restreinte.

Cette prestation, dont la *nécessité légale* restreint la liberté du débiteur, doit être exécutée dans un certain temps, en un certain lieu, et d'une certaine manière. En effet, nous venons de voir que l'obligation constitue une restriction de la liberté du débiteur. Or la liberté renfermant la faculté d'agir ou de ne pas agir toujours, partout, n'importe comment, les restrictions qu'on lui met ne peuvent être caractérisées qu'à ces trois points de vue.

Le temps, le lieu, et le mode d'exécution de la prestation qui en fait l'objet, sont donc des éléments essentiels de l'obligation. Par conséquent, si une obligation n'est pas exécutée au temps et au lieu où elle doit l'être, de la manière qui lui est propre, on peut dire qu'elle n'est pas exécutée du tout ; car, s'il est fait quelque chose par le débiteur sous prétexte de l'accomplir, ce quelque chose ne peut être, tout au plus, qu'un équivalent partiel.

Il peut se faire que le créancier se contente de cet équivalent. Il se peut aussi que le créancier ne soit pas disposé à s'en contenter, mais qu'il ne souffre aucun dommage à raison de l'inexécution de l'obligation. Il est évident qu'il ne peut alors avoir aucune action contre son débiteur, puisqu'il n'a pas d'intérêt à l'exécution de l'obligation, et que l'intérêt est la base et la limite des actions.

Mais il arrivera bien rarement que le créancier, ou bien n'ait aucun intérêt à l'accomplissement de l'obligation, ou bien veuille se contenter de l'équivalent partiel que fournit le débiteur. Le plus souvent donc, lors qu'une obligation n'est pas exécutée exactement au temps, au lieu et de la manière voulus, on voit s'élever la question de savoir quels sont les effets de son infraction totale ou partielle. A première vue, il semble que ces effets

sont faciles à comprendre. L'obligation constitue pour le créancier un droit ; or la violation de tout droit donne naissance à une action. L'infraction d'une obligation, lorsqu'il en résulte quelque effet, doit donc produire une action en faveur du créancier. Mais, quelles sont les conditions nécessaires pour que cette action existe, quels sont les faits qui peuvent l'empêcher de prendre naissance, quel en est l'objet ? Voilà autant de questions subsidiaires, dont la solution est nécessaire pour résoudre cette question principale : quels sont les effets de l'inexécution d'une obligation ?

Avant d'aller plus loin, constatons bien un principe trop souvent méconnu. Suivant beaucoup d'auteurs, pour savoir quels effets produit l'infraction d'une obligation, il faut distinguer entre les obligations de donner, les obligations de faire et les obligations de ne pas faire. L'inexécution d'une obligation de l'une de ces deux dernières espèces donnerait toujours lieu à une action en dommages intérêts, pendant que l'infraction de l'obligation de donner pourrait quelquefois occasionner une action pour en obtenir l'exécution. La raison qu'on donne de cette distinction, c'est que personne ne peut être forcé à faire, *nemo precise cogi potest ad factum*, pendant qu'on peut forcer un débiteur à donner.

Cette distinction provient de ce qu'on ne fait pas attention à la nature propre de l'action en dommages-intérêts. Celle-ci est une action en indemnité c-à-d une action tendant à mettre le créancier comme il serait si l'obligation eût été exécutée. Or on indemnise presque toujours avec de l'argent, parceque celui-ci permet de se procurer toute espèce de choses. Mais il est évident qu'on pourrait aussi indemniser le créancier en lui donnant les choses qu'il voudra se procurer avec de l'argent. Voilà pourquoi, lorsqu'il est possible de procurer directement au créancier ce que lui aurait donné l'exécution de l'obligation, on le lui procure. Cela n'est possible, en général, que dans les obligations de donner ; cependant, la chose peut aussi se pratiquer quelquefois dans les obligations de faire, par exemple, dans l'obligation de construire une maison. Mais, même alors, il est évident que le créancier n'obtient qu'une indemnité, qu'un équivalent, car il avait droit de compter sur un certain exercice de l'activité du débiteur, et ici le débiteur reste inactif ; c'est l'autorité publique qui agit à sa place, bien qu'elle le fasse à ses dépens.

L'on se convaincra mieux encore de la vérité de ce qui précède, si l'on veut faire attention à la nature des obligations. Celles-ci sont des restrictions à la liberté du débiteur. La liberté de ce dernier consiste à faire tout ce que lui permet le droit commun, et à s'abstenir de tout ce qu'il ne lui ordonne pas. Pour qu'elle soit restreinte, il faut donc qu'il soit dans la *nécessité légale* de faire ou de ne pas faire quelque chose en dehors du droit commun. Cela est si vrai que l'obligation de donner est une espèce d'obligation de faire, c'est l'obligation de faire la remise d'une chose ou la translation d'un droit.

Il est donc constant, que toute obligation, lorsque sa violation la transforme en droit d'action, doit nécessairement donner lieu à une action en indemnité, c. à. d. en dommages intérêts.

Voyons, maintenant, quelles sont les conditions nécessaires pour qu'une obligation se transforme ainsi en action de dommages-intérêts. Sans doute, il faut, pour cela, qu'elle soit enfreinte, que le droit de créance du créancier soit violé, puisque toute action suppose nécessairement la violation d'un droit. Mais, quand une obligation peut-elle être considérée comme enfreinte par le débiteur ? D'abord, ce ne peut être que lorsqu'il ne l'exécute pas exactement au temps, au lieu et de la manière qui lui sont propres.

Ceci nous amène à examiner le temps, le lieu et la manière dont un débiteur doit agir pour exécuter son obligation.

Quant au mode d'action nécessaire de la part du débiteur pour qu'il exécute son obligation, il n'y a presque rien de général à en dire. Toutes les obligations ont sur ce point un tel caractère d'individualité, qu'on n'y rencontre, presque au aucun élément commun. Les seules obligations, à peu près, pour lesquelles on puisse à cet égard poser des règles générales, sont les obligations de genre, comme l'obligation de donner un cheval, et les obligations de quantités, comme l'obligation de fournir tant de minots de blé, tant de gallons de vin, surtout l'obligation de donner telle somme d'argent. Mais les règles générales sur le mode d'exécution de ces obligations sont si connues, qu'il serait oiseux de s'en occuper.

Le lieu où doit s'accomplir chaque obligation ne présente guère plus de difficultés. D'abord, il peut être déterminé par la convention, dans les obligations qui naissent des contrats. Il l'est même implicitement dans certains cas. C'est ainsi, par exemple, que l'obligation de livrer un immeuble ne peut être exécutée

qu'au lieu où il se trouve. Dans le doute sur l'étendue d'une obligation, celle-ci doit s'exécuter de la manière la moins onéreuse pour le débiteur. S'il s'agit d'une obligation de donner, il peut donc alors l'exécuter soit au lieu où se trouve la chose à remettre, soit à son propre domicile. Quant aux obligations de faire ou de ne pas faire, le lieu de leur exécution est presque toujours déterminé par leur nature même.

J'arrive à la question de savoir à quel moment un débiteur doit exécuter son obligation. D'abord, s'il a un délai pour le faire, il est évident qu'il n'est pas obligé d'agir avant l'arrivée du terme. Mais, soit qu'ayant eu un délai celui-ci soit expiré, soit qu'il n'ait aucun délai, doit-il exécuter immédiatement son obligation ? Oui, s'il a été convenu avec le créancier que l'expiration du délai tiendrait lieu au débiteur d'un avertissement d'exécuter ; on bien si la loi a décidé que le débiteur n'aurait pas droit à un avertissement, ce qu'elle fait d'une manière générale pour toutes les obligations de ne pas faire, pour toutes celles qui ne peuvent être accomplies d'une manière utile pour le créancier que pendant un certain temps, et pour toutes les obligations commerciales pour l'accomplissement desquelles un terme a été fixé, parcequ'elle présume alors une convention dans ce but.

Dans tout autre cas, le débiteur n'est obligé d'exécuter son obligation que lorsque son créancier lui a demandé de le faire. Cette demande est exigée, parceque, sans elle, le débiteur peut croire que son créancier n'a pas besoin de la prestation, et ne souffre pas de ce que celle-ci est retardée. La demande peut se faire soit sous forme d'une interpellation en justice, soit sous forme de sommation extra-judiciaire. Cette dernière espèce de sommation doit, en général, se faire par écrit, et la meilleure forme alors consiste dans un protêt notarié. Toutefois, s'il s'agit d'une obligation née d'un contrat verbal, la demande peut se faire verbalement. (Articles 1067 à 1069 du Code Civil.)

Il est évident que puisque, la loi exige cette demande d'exécution, cette sommation du créancier, elle doit être faite aux frais de celui-ci, et non pas aux dépens du débiteur. C'est donc le créancier qui doit payer les frais du protêt ou de l'exploit d'ajournement signifiés à son débiteur, lorsque celui-ci a droit à une mise en demeure. C'est aussi ce que nos tribunaux décident sans difficulté à l'égard du protêt notarié ; mais, par un manque de logique des plus singuliers, si un créancier, au lieu d'avertir son débiteur au moyen d'un protêt notarié, l'avertit au moyen

d'un exploit d'ajournement; nos cours font invariablement payer les frais de celui-ci au malheureux débiteur, même si ce dernier avait les meilleures raisons de croire que son créancier n'avait pas besoin immédiatement de la prestation due.

Lorsqu' est arrivé le moment où le débiteur doit exécuter son obligation, s'il ne l'exécute pas de suite, on dit qu'il est *en demeure*, *in mora*, c'est-à-dire, en retard dans l'accomplissement de son obligation. Il enfreint alors celle-ci dans une de ses parties essentielles.

En résumé, la prestation qui fait l'objet d'une obligation quelconque se compose de trois éléments : le temps, le lieu et la mode d'exécution; l'obligation peut, par conséquent, être enfreinte soit quant à ces trois éléments à la fois, soit quant à l'un d'eux seulement. Si cette infraction produit des effets, ce ne peut être qu'une action de dommages-intérêts en faveur du créancier, et pour cela, il faut que le créancier ait eu intérêt à ce que l'obligation fût exécutée.

Voyons maintenant, dans quels cas le débiteur est tenu d'une pareille action, dans quel cas il en est exempt, quel est le but de l'action, et quelles en sont les limites.

D'abord dans quel cas l'inexécution totale ou partielle d'une obligation la transforme-t-elle en action de dommages-intérêts? On peut poser comme principe, que c'est dans tous les cas où la loi ne suppose pas qu'il a été impossible au débiteur d'exécuter son obligation. Il est évident, en effet, qu'aux yeux de la loi, comme aux yeux du bon sens, à l'impossible nul n'est tenu. Sans doute c'est au débiteur à prouver l'impossibilité dans laquelle il a été d'accomplir son obligation; mais dès qu'il l'établit, il n'est responsable ni de ce qu'il ne l'a pas exécutée au temps, ni de ce qu'il ne l'a pas exécutée au lieu, ni de ce qu'il ne l'a pas exécutée de la manière voulus, ni même de ce qu'il ne l'a pas exécutée du tout.

Il est donc très-important de savoir quand la loi considère qu'il y a eu une impossibilité suffisante pour dégager le débiteur de toute responsabilité. D'abord elle ne tient compte que d'une impossibilité *absolue*, c'est-à-dire d'une impossibilité qui existerait pour tout le monde, par exemple, l'impossibilité provenant de la mort du cheval, lors qu'il s'agit de l'obligation de fournir un cheval. La loi ne prend pas en considération l'impossibilité *relative*, c'est-à-dire, celle qui n'existe que pour le débiteur, comme serait l'obligation de donner cent louis pour celui qui n'a pas cent

sous. Voici pourquoi la loi exige ici une impossibilité absolue pour décharger le débiteur ; ou l'obligation résulte d'un fait volontaire de sa part, et l'on ne saurait lui permettre de se plaindre qu'il s'est engagé à plus que ne lui permettent ses facultés qu'il devait connaître ; ou bien son obligation provient d'un fait étranger à sa volonté, il est obligé par l'opération de la loi, et celle-ci ne peut lui permettre de soutenir qu'il est obligé au delà de ses forces, puisque ce serait l'accuser elle-même de manquer de sagesse.

Il n'y a donc qu'une impossibilité absolue à l'exécution d'une obligation, qui décharge le débiteur de toute responsabilité à l'égard des effets de l'inexécution totale ou partielle de la prestation. Or jamais ou presque jamais il ne peut exister une pareille impossibilité à l'égard des obligations de genre et des obligations de quantités. En effet, tant qu'il y aura un individu du genre, une quantité suffisante de l'espèce, il sera absolument possible de les fournir ; et l'on sait que presque jamais les genres ne disparaissent, *genera non pereunt*. Le débiteur de l'une de ces obligations est donc toujours responsable des effets soit de leur inexécution complète, soit de leur exécution irrégulière, soit du simple retard dans leur exécution.

La question d'impossibilité ne peut donc se présenter que pour l'obligation d'une prestation individuellement déterminée. Ce n'est pas tout, il ne suffit pas qu'il y ait eu impossibilité absolue d'exécuter l'obligation ; il faut, en outre, que le débiteur ait fait tout ce que la loi exige de lui, ait eu tout le soin, toute la diligence, se soit donné toute la peine qu'elle demande, pour rendre cette accomplissement possible.

Ceci nous amène à examiner la question de savoir quelle diligence, quels soins un débiteur doit avoir pour accomplir exactement son obligation au temps, au lieu et de la manière voulus.

D'abord, il peut arriver que ces soins aient été déterminés par une convention contre le créancier et le débiteur. Ceux-ci peuvent, par cette convention, astreindre le débiteur à plus ou à moins de soins que n'en exige la loi. Ils peuvent le rendre responsable même du cas fortuit et de la force majeure, c'est-à-dire, d'événements que, dans l'opinion du législateur, il ne peut contrôler. A l'inverse, ils peuvent le décharger des soins que la loi lui impose. En un mot, les parties jouissent ici de la liberté des conventions proclamée par le code civil. Mais aussi, elles sont soumises, ici comme ailleurs, à la restriction de cette liberté maintenue avec raison par ce code. Celui-ci défend, et annule par la



même, toute convention contraire à l'ordre public ou aux bonnes mœurs. Comme il serait contraire aux bonnes mœurs de décharger d'avance le débiteur des conséquences de son dol, de sa mauvaise foi, la liberté des parties ne les autorise pas à acquitter d'avance le débiteur des conséquences de son dol. (Art. 13, 14, 1257, 1258, 1072 C. C.)

Le débiteur est donc toujours responsable de son dol, à l'égard de son obligation, c'est-à-dire, qu'il ne peut rien faire intentionnellement de mauvaise foi, pour rendre impossible l'exécution de cette obligation. D'un autre côté, il n'est jamais responsable de la force majeure ou du cas fortuit, à moins d'une convention entre lui et son créancier. (Art. 1072 C. C.)

En dedans de ces deux limites, il est toujours responsable de l'inexécution de son obligation. La loi veut que, pour rendre possible l'accomplissement de la prestation qu'il doit, il ait tous les soins, toute la diligence, qu'aurait un *bon père de famille*. (Code Civil, art, 1064).

Mais, que faut-il entendre ici par *soins d'un bon père de famille*? Sont-ce les soins que le débiteur a coutume d'avoir pour ses propres affaires? Sont-ce les soins qu'aurait un homme considéré comme ayant une diligence ordinaire, c'est-à-dire, comme n'étant ni un modèle de diligence, ni un exemple de négligence?

Sont-ce les soins qu'aurait un de ces hommes dont la vigilance et l'activité sont presque sans égales? Est-ce tantôt l'une de ces espèces de soins, tantôt l'autre, suivant la nature de l'obligation, suivant les circonstances dans lesquels elle a pris naissance? C'est là une des questions les plus importantes et les plus pratiques que puisse soulever l'interprétation du code civil. On doit donc regretter vivement que ce lui-ci ne l'ait pas traitée d'une manière plus complète et plus claire. En face des dispositions imparfaites qu'il contient sur la matière, on peut soutenir à-peu-près toutes les opinions. Toutefois, il y a une chose certaine: c'est que les auteurs du code ont voulu proscrire la théorie de la prestation des fautes exposée par Vinnius et Pothier, théorie qui avait été adoptée par la jurisprudence en France et en Canada, (Voir art. 1064 C. C.; Rapport des codificateurs sur le titre des obligations, page 19). Puisque cette théorie a été mise de côté, il n'est pas inutile d'en rappeler les traits principaux, afin de savoir exactement quelle est la doctrine qui a été proscrire.

Ou bien le créancier seul était intéressé au contrat ou autre acte qui a produit l'obligation, ou bien le débiteur seul y avait

l'intérêt, ou bien le créancier et le débiteur étaient intéressés. Au premier cas le débiteur n'était responsable que de son dol et de la faute grossière, *lata culpa*, laquelle était assimilée au dol; au second cas le débiteur répondait de la faute même la plus légère *culpa levissima*; au troisième cas il répondait de la faute légère, *culpa levis*. La faute très-légère consistait dans la négligence des soins de l'homme le plus diligent qui se pût imaginer; la faute lourde dans la négligence des soins de l'homme le plus négligent qui se puisse concevoir; la faute légère dans la négligence des soins d'un homme diligent comme le commun des hommes. D'après cette théorie, le dépositaire ne devait répondre que de son dol; le commodataire répondait même de la faute la légère, et le vendeur, le locataire, l'associé etc. étaient responsables de la faute légère.

Déjà Lebrun, avocat au Parlement de Paris du temps de Pothier, avait démontré que cette doctrine n'était pas celle du droit romain. Il aurait dû faire davantage, et prouver qu'elle est contraire, en bien des points, au bon sens, à l'équité, à la morale et aux principes généraux du droit. En effet, il est évident que, pour déterminer la conduite à tenir par un débiteur, on ne doit tenir compte que de ce qui le concerne; on ne doit pas augmenter ou diminuer sa responsabilité pour des raisons tirées de personnes étrangères, pour des raisons qui ne touchent pas à sa conscience. Or, dans la doctrine que l'on vient de voir, la responsabilité du débiteur varie, non seulement avec l'intérêt qu'avait le débiteur au contrat, mais aussi avec celui qu'y avait son créancier. On aurait dû par conséquent, mettre cette doctrine de côté, même si elle eût été fondée sur le droit romain, puisque celui-ci, suivi seulement comme raison écrite, devait être abandonné dès qu'il était contraire à la raison. Mais il y a plus comme nous l'avons vu, Lebrun avait déjà prouvé qu'elle n'est pas fondée sur le droit romain. M. Hasse a de nos jours complété cette preuve. Il a fait plus: il a exposé la vraie théorie du droit romain sur la prestation des fautes. Il est à propos de la faire connaître ici, parcequ'on peut en tirer un grand parti pour établir quelle doctrine devrait être adoptée chez nous.

Une convention entre le créancier et le débiteur peut déterminer les soins que celui-ci doit donner à l'exécution de son obligation. Par cette convention sa responsabilité peut être augmenté, de même qu'elle peut être diminuée, sauf cette restriction qu'elle ne peut être réduite au point de la décharger de la responsabilité de

son dol. A défaut de convention voici la position du débiteur : ou bien il n'avait aucun intérêt à l'acte, que ce soit ou non un contrat qui a produit son obligation, ou bien il y avait intérêt. Au premier cas, c'est-à-dire, si le débiteur n'avait pas d'intérêt, et tel est le dépositaire, il n'est responsable que de son dol ; il n'est obligé d'apporter aucun espèce de soins à l'exécution de son obligation. C'est déjà bien assez que le débiteur se trouve lié sans avoir reçu aucun équivalent pour son obligation ; on n'a pas voulu étendre cette obligation au delà des limites les plus restreintes possible. Comme on le voit, la vraie doctrine du droit romain s'accorde pour ce premier cas avec celle que lui ont attribuée Vinnius et Pothier. Si le débiteur avait intérêt à l'acte en vertu duquel il est obligé, il doit pour exécuter son obligation tous les soins d'un *bon père de famille*, c'est-à-dire, d'un propriétaire qui a autant de diligence que le commun des hommes. Il n'est pas tenu d'avoir tous les soins qu'aurait un homme d'une diligence plus qu'ordinaire. D'un autre côté, il ne lui suffit pas d'être aussi diligent que pour lui-même, s'il a coutume d'être négligent pour ses propres affaires. Par exception, une telle diligence lui suffit, s'il a intérêt à l'exécution de son obligation, parceque comme dans la société, cette obligation se trouve être alors sa propre affaire. On peut voir que, pour le second cas, cette théorie diffère de celle exposée par Pothier surtout en deux points ; jamais, à moins d'une convention expresse ou tacite, un débiteur n'est obligé à plus de diligence qu'on n'en trouve chez le commun des hommes ; jamais on ne tient compte de l'intérêt que pouvait avoir le créancier à l'acte qui a produit l'obligation. Dans cette doctrine il ne peut pas y avoir trois degrés, trois espèces de faute ; il n'y a qu'une faute, et elle consiste dans l'absence des soins que doit donner le débiteur à l'exécution de son obligation.

Cette théorie est parfaitement conforme au bon sens, et à l'équité, parfaitement conforme aussi à l'intention du créancier et du débiteur. Lorsque celui-ci n'a aucun intérêt à l'*acte obligatoire* il rend un pur service au créancier en s'obligeant ; l'équité ne permet pas qu'on étende son obligation au delà de ce qui est strictement nécessaire, et l'on ne peut supposer que le créancier soit assez déraisonnable, assez exigeant pour entendre l'astreindre à d'avantage. Quand au contraire le débiteur est intéressé, il reçoit un équivalent pour son obligation, on peut sans injustice, sans iniquité en étendre les limites. D'un autre côté on peut

raisonnablement supposer que le créancier, fournissant une valeur pour l'obligation, a entendu recevoir une valeur égale dans la prestation. Et comme il peut rarement connaître la manière habituelle d'agir de son débiteur, comme il ne peut d'ailleurs compter qu'il se comportera suivant ses habitudes ordinaires, il est à présumer que le créancier a dû compter, de la part de son débiteur sur la diligence du commun des hommes et que le débiteur a entendu s'y astreindre. N'oublions pas qu'il s'agit ici d'une question que les parties pourraient résoudre par une convention et que nous devons par conséquent rechercher quelle a dû être la volonté qu'elles n'ont pas déclaré expressément.

Puisque la vraie théorie du droit romain sur la prestation des fautes est conforme à la raison et à l'équité, il est évident que nous la devons adopter si le code ne lui est pas contraire. A-t-il des dispositions qui lui répugnent? Nous allons voir que non. Les articles qui déterminent les soins du débiteur dans l'exécution de son obligation sont, d'abord l'art. 1064 cité plus haut, qui pose la règle à l'égard de toutes les obligations de donner, puis les art. 290, 343, 1626, 1570, 1675, 1710 1768, 1802, 1825, 1843, 1844, 1973, dans les quels on trouve déterminée la diligence du débiteur dans la tutelle, la curatelle, le louage de choses, le louage d'ouvrage, les entreprises de transport, le mandat, le commodat, le dépôt, le séquestre, la société, le nantissement. Quelle est la pensée qui ressort de ces dispositions si nombreuses? Elle me paraît être ceci, en général, à moins de convention au contraire le débiteur doit apporter à l'exécution de son obligation tous les soins d'un bon père de famille, c'est-à-dire d'un homme ayant la diligence du commun des hommes. A la différence du droit romain, cela s'applique même au cas où il n'avait aucun intérêt à l'acte qui a engendré son obligation par conséquent au dépositaire, au mandataire, au tuteur. Toutefois même pour ceux-ci l'intention des auteurs du code paraît avoir été de se rapprocher du droit romain. En effet pour le cas où le mandat est gratuit et par conséquent désintéressé de la part du mandataire, l'art. 1710 permet au tribunal de mitiger sa responsabilité. Il est vrai que le code ne dit rien du tuteur et du dépositaire, mais on doit sans hésiter leur appliquer la même décision, puisqu'aux yeux de la raison et de l'équité, il n'y a aucune raison de les traiter autrement, et que le droit romain se montrait moins sévère pour le dépositaire que pour le mandataire et mettait ce dernier dans la même position que le tuteur.

Quant à la restriction par le droit romain de la diligence du débiteur intéressé à l'exécution de son obligation, aux soins qu'il a pour ses propres affaires, il ne peut y avoir aucune difficulté de l'appliquer à notre droit, puisque les art. 1843 et 1844 en posent clairement le principe. En effet, on voit par ces articles que dans l'intention des rédacteurs du code, l'associé ne doit pas traiter mieux ses affaires que celles de la société. On en doit conclure qu'il n'est pas obligé non plus de les traiter plus mal. Il doit donc avoir, pour les affaires de la société, exactement les mêmes soins, la même diligence que pour ses propres affaires.

En somme voici la doctrine du code sur la prestation des fautes en l'absence de convention ; le débiteur doit dans l'exécution de son obligation, apporter les soins, mettre la diligence du commun des hommes ; il ne lui suffit pas d'y mettre la même diligence qu'il a coutume d'avoir pour ses propres affaires, s'il est habituellement négligent. Toutefois, cette diligence lui suffit s'il a intérêt à l'exécution de son obligation, c'est-à-dire, s'il en doit profiter, comme c'est le cas pour l'associé. Et même si le débiteur n'a pas un pareil intérêt, le juge peut mitiger sa responsabilité, quand il s'est obligé sans avoir intérêt à ce qui a produit l'obligation, comme c'est le cas pour le mandataire, le tuteur, le dépositaire.

Quelle que soit la doctrine que l'on adopte sur la diligence que le code exige du débiteur dans l'accomplissement de son obligation, il y a un point en dehors de toute discussion ; c'est que si le débiteur n'a pas eu tous les soins exigés de lui par la loi, il est responsable des suites de l'inexécution de son obligation, c'est-à-dire, de ce qu'elle n'est pas accomplie au temps, au lieu et de la manière voulus. Il est réputé l'avoir enfreinte, violée et, suivant le droit commun, il est tenu d'une action envers son créancier, d'une action en dommages intérêts, ou, si l'on veut, en indemnité. A plus forte raison, en est-il de même du débiteur qui contrevient intentionnellement, par dol, à son obligation. Dans les deux cas, toutefois, il ne répond que des suites directes, nécessaires, inévitables, de l'inexécution ; il n'est pas responsable des conséquences que cette inexécution a pu *occasioner*, mais dont elle n'a pas été la *cause inévitable*, que le créancier aurait pu écarter avec une diligence convenable ; car on peut dire avec raison, que ces conséquences sont dûes plutôt à la négligence, à l'inertie du créancier, qu'au dol ou à la faute du débiteur. (Art. 1070, 1071, 1072, 1075 C. C.)

Mais que comprennent ces dommages-intérêts, cette indemnité ? Ici encore, la convention des parties peut tout régler. Le créancier et le débiteur peuvent déterminer d'avance l'étendue et la nature des dommages qu'elles prévoient devoir résulter de l'infraction de l'obligation, et de l'indemnité qui devra être fournie, pour le cas où le débiteur sera responsable de cette infraction. Il n'y a, en effet, aucune considération tirée de l'ordre public ou des bonnes mœurs, qui puisse venir restreindre ici la liberté des conventions. Autrefois les tribunaux se permettaient souvent de mettre de côté ces conventions ; mais le code Art. 1076 leur a enlevé le pouvoir qu'ils s'étaient ainsi arrogé. Ils ne peuvent donc plus annuler une pareille convention, comme étant purement *comminatoire*, ni réduire l'indemnité fixée par elle. Tout ce qui leur est permis, c'est lorsque l'obligation a été exécutée en partie, de déterminer les dommages évités au créancier par là, et de dire quelle proportion de l'indemnité fixée correspond aux dommages réellement soufferts. Art. 1076, § 2.

Si les parties n'ont pas déterminé elles-mêmes l'indemnité payable au créancier, il faut alors que la loi le fasse pour elles, en prenant pour base leur intention probable qu'elles n'ont pas exprimée. D'après l'art. 1073, sauf toutefois la modification apportée par l'art. 1075, les dommages intérêts se composent de deux chefs : la perte subie par le créancier, et le gain qu'il a manqué de faire à raison de l'inexécution de l'obligation, *lucrum cessans, damnum emergens*. En un mot, le créancier avait à l'accomplissement un certain intérêt appréciable en argent ; le débiteur doit, pour l'indemniser, le désintéresser complètement. Car indemniser une personne de quelque chose, c'est la mettre, au point de vue pécuniaire, dans la même position où elle serait si le fait qui lui a causé du dommage ne fût pas arrivé.

Il se peut faire que l'obligation, ou bien soit enfreinte pour le tout, ou bien soit enfreinte dans un ou plusieurs seulement de ses éléments essentiels que nous avons vus, savoir : le temps, le lieu, le mode d'exécution de la prestation. Le créancier, nous l'avons vu, et cela va de soi, n'a pas droit à une indemnité, si l'infraction ne lui cause aucun dommage ; car alors il n'a pas d'intérêt à poursuivre son débiteur, et l'on sait que l'intérêt est la base et la mesure des actions. Même si l'infraction de l'obligation a été la cause directe de dommages pour le créancier, il n'a pas toujours droit de s'en faire indemniser entièrement par son débiteur. Il a ce droit d'une manière absolue, seulement si c'est par dol que

son débiteur n'a pas exécuté. Si c'est seulement par faute, le débiteur ne doit l'indemniser que des dommages qui ont pu être prévus. La raison de cette différence, c'est que le débiteur qui, par dol, intentionnellement, enfreint son obligation, est réputé avoir voulu se charger de toutes les conséquences de l'infraction quelles qu'elles puissent être. Au contraire, celui qui l'enfreint par faute, mais sans intention, ne peut être présumé s'être chargé d'une telle responsabilité à laquelle il n'a même pas songé. Il n'a dû penser aux conséquences possibles de l'infraction, que lorsqu'il a contracté son obligation, et c'est au moment où il l'a faite, qu'il faut se reporter, pour savoir de quoi il a entendu se rendre responsable. Ou bien encore : la responsabilité du débiteur coupable de dol est fondée sur un délit, dont les conséquences doivent s'apprécier comme celle des autres délits : la responsabilité du débiteur seulement en faute est fondée sur une convention tacite, et ne doit pas être étendue au delà de ce qu'ont dû vouloir les parties. (Art. 1074 C. C.)

Les règles que nous venons de voir s'appliquent aux obligations dont l'objet n'est pas une somme d'argent. Quant aux obligations de sommes d'argent, leur infraction donne toujours droit au créancier de réclamer les intérêts légaux sur la somme due, depuis la demeure du débiteur, et ce quand même cette infraction n'aurait causé aucun dommage. Mais à l'inverse, elle ne lui permet pas d'exiger davantage, quels que soient les dommages qu'il a soufferts. Voici la raison de cette exception : la loi présume que les intérêts légaux d'une somme représentent toujours exactement la valeur de l'usage de cette somme. Cette présomption est fondée sur une erreur économique ; car on sait que la valeur de l'usage des capitaux dépend du rapport entre l'offre et la demande qui s'en font, et ne peut être déterminée d'avance d'une manière absolue. Mais en admettant comme une vérité cette erreur du législateur, l'art. 1077 est parfaitement raisonnable. En effet, on peut toujours se procurer une chose eu en donnant la valeur ; on peut donc toujours avoir une somme d'argent, en donnant la valeur de son usage. Le créancier d'une somme d'argent peut donc toujours éviter les dommages résultant du défaut de paiement, en empruntant cette somme au taux légal d'intérêts. S'il souffre des dommages au delà du montant de ces intérêts, c'est donc par sa faute, et non par celle de son débiteur. D'un autre côté, sans prouver de dommages, le créancier a droit aux intérêts de la somme due, parcequ'on présume qu'il aurait pu la placer et en

retirer ces intérêts ; par conséquent, on présume que le défaut de paiement lui a fait manquer de la gagner. L'art. 1077 est donc, au fond, conforme à l'art. 1075.

Encore une fois l'art. 1077 est fondé sur une erreur économique. Aussi, malgré la règle qu'il établit, arrivera-t-il souvent qu'un créancier perde plus ou moins que l'indemnité qui lui est payée. Mais il y a un moyen bien simple d'éviter cet inconvénient : c'est de profiter de la liberté des conventions, pour fixer d'avance, ici comme ailleurs, les dommages dont le créancier devra être indemnisé par son débiteur.

En résumé, toute obligation astreint celui qui en est tenu à faire une prestation dans un certain temps, dans un certain lieu et d'une certaine manière. Il doit donner, à l'accomplissement de cette prestation, le soin qu'un homme ayant une diligence ordinaire donne à ses propres affaires. Toutefois, lorsqu'il s'est obligé gratuitement, on peut ne pas exiger de lui toute cette diligence, pourvu qu'il en ait eu autant que pour lui-même, et cela lui suffit toujours, s'il doit profiter de l'accomplissement de son obligation. Dès qu'il n'a pas eu tout le soin exigé de lui, on dit qu'il est *en faute* s'il n'exécute pas exactement son obligation. Il répond alors de toutes les suites inévitables, nécessaires, de l'inexécution, comme il en répond s'il n'a pas voulu remplir son engagement. Sa responsabilité consiste en ce qu'il doit indemniser ce dernier des dommages que lui cause l'infraction de l'obligation. Ces dommages se composent de la perte faite et du gain manqué par le créancier ; mais si le débiteur n'a été coupable que de faute, il ne doit indemniser que de ceux qu'il a pu prévoir. L'indemnité pour l'inexécution d'une obligation d'argent consiste seulement, mais toujours, dans les intérêts légaux de la somme due. Enfin, les parties peuvent régler par convention les soins à donner par le débiteur, et l'indemnité qu'il devra payer au cas d'inexécution de son obligation ; les tribunaux peuvent, à titre d'indemnité, faire exécuter la prestation aux frais du débiteur, lorsque cela est possible.

F. LANGELIER.



## DEEDS OF COMPOSITION AND DISCHARGE BETWEEN COPARTNERS AND THEIR CREDITORS UNDER THE INSOLVENT ACT OF 1869.

(Continued from page 188, No. II.)

It may be interesting and at the same time productive of benefit, to consider the provisions of the law of France on the subject of composition and discharge in the matter of partnerships. It is unnecessary to go further back than the year 1808, although previous to that time the Ordonnance of 1673, and many other edicts, regulated proceedings against insolvent traders. The "Code de Commerce" of France came into force on the 1st January, 1808. Its third book bore the title "Des Faillites et des Banqueroutes," and constituted what would be called in English "An Insolvent and Bankrupt Act." It contained one hundred and seventy-eight sections, from number 437 to 614 both inclusive. Traders alone were subject to its provisions.

By the law of the 28th May, 1838, the third book of the "Code de Commerce," "Des Faillites et des Banqueroutes," was, save and except as regarded then pending proceedings, repealed, and another book was substituted therefor, containing the same number of sections, numbered from 437 to 614.

The failure of partnerships did not form under either the law of 1808 or that of 1838 the subject of a special series of provisions.\* In that of 1838 partnerships are mentioned particularly in numbers 438, 531, and 604, and it would seem as if in all cases, save where there was special legislation on the subject, the intention of the codifiers was, like that of the British and Canadian legislatures, to apply to insolvent partners the provisions applicable generally to individual insolvent traders.

Composition and discharge, treated of by the 507th and following articles of the law of 1838, can only be effected and obtained by a trader who has been duly declared insolvent after what is called *la vérification des créances* has been completed, and the true state of his assets and liabilities is known by the return thereof made by *les syndics* (assignees) of his estate. The deed (concordat) of

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\* 1 Renouard 255.

composition and discharge must be consented to at a public meeting by a majority of *all* the insolvent's creditors, representing three-fourths of all claims sworn to and verified or admitted *par provision*. Secured or privileged creditors have no right to vote save on condition of forfeiting their security or privilege. The meeting is held in the presence of the *juge commissaire*, and if the requisite majorities are there present and consent, the deed is then and there signed; if but one of the requisite majorities is present and consents, the deliberation is put off for a week, and if on the day appointed the requisite double majority is not obtained, proceedings in insolvency are resumed, and the estate is wound up for the benefit of the creditors.\*

The law of France differs from that of England on the subject of partnership in two very important particulars. In the former country an ordinary trading partnership is what is called an *être moral*, that is to say, a creation of the law distinct from the persons composing it, having rights and privileges, and partaking somewhat of the nature of an incorporated body under the provisions of the English law; in France the property of the partnership cannot be attached for the debts of one of the partners, nor can his share in any portion of the property of the partnership be levied upon or seized for such debt.† Even after the insolvency or bankruptcy of the partnership, the *être moral* still, according to the best authorities, continues to exist,‡ in fact, art. 531 specially provides for the case where a *concordat* is refused to the partnership for the granting of one to any of the partners, thereby admitting that the *être moral* exists, pending insolvency. In France, the individual members of the partnership are liable jointly and severally to the creditors of the partnership, and the separate creditors of the partners as a body have no privilege on their debtor's estates over the partnership creditors.

In England, on the other hand, at law the sheriff must take possession of the whole of the goods levied upon, and if there be two partners in a firm who have equal shares in the partnership property he must sell a moiety thereof undivided for the defen-

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\* 2 Renouard, pp. 1—36.

† Masse Droit Com. No. 2666; Rolland de Villargues Dict. de Droit, vbo. Société No. 11; Pardessus, Droit Com. No. 975.

‡ 1 Renouard p. 307, 308, § 20, art. 443; 5 Bravard Veyrières by Delangle, pp. 676, 677.

dant partner's debt, and the vendee will be tenant in common with the other partner.\*

The bankruptcy of one of the partners dissolves the partnership as to all the partners.† The separate estate of each partner also is liable for the payment of the joint debts, subject, however, to the previous payment in full of the separate debts of such partner.‡

The foregoing are some of the points upon which differences in the law of partnership of England and France exist, and are cited for the purpose of exhibiting the difficulties which beset the settlement of the question of composition and discharge in this Province.

In England, under the law of 1861, in France and Canada, it is now admitted that when a firm is put into bankruptcy, or insolvency, each of the members of that firm becomes a bankrupt or an insolvent. In France alone the *être moral* of the partnership continues to exist.

In France, on the bankruptcy of a firm, the joint estate has its creditors, its *syndicat*, its *juge commissaire*, and its proper tribunal; and the separate estate of each partner has also its creditors, *syndicat*, *juge commissaire*, and tribunal. The different estates are kept perfectly separate; the same assignee may be appointed to all the estates, joint and separate; or others than the assignee of the joint estate may be appointed assignees of the estates of the different partners. Thus, where a firm is composed of two partners, A may be appointed assignee to the joint estate, B to the estate of one of the partners, C to the estate of the other. The creditors of the firm alone vote or act in the *faillite* of the firm, and they, together with his separate creditors, alone vote or act in the *faillite* of each of the partners. In questions of *concordat* (composition and discharge) where a firm is *en faillite*, in order to replace the members of the firm in possession of their joint and separate estates, a concordat must be entered into between the creditors of the firm and its members, and the creditors of each separate estate (therein included the joint creditors), with

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\* *Heydon vs. Heydon*, 1 Salk. 392; *Johnson v. Evans*, 7 M. & Gr. 250; *Jacky v. Butler* 2 Ld. Raym. 871; *Holmes v. Meutze*, 4 Ad. & E. 131.

† *Hague vs. Rolleston*, 4 Burr. 2174; *Fox v. Hanbury Cowp.* 448; *Ex pte. Smith*, 5 Vesey, 295; *Ex pte. Williams*, 11 Ves. 5.

‡ *Griffith & Holmes Bankruptcy*, p. 656.

the member of the partnership originally indebted to them, enter into the concordat. The compositions payable by each of the estates may be different. If the joint creditors refuse to enter into a concordat with the firm, concordats may be entered into by the partners individually with the creditors of their separate estates, by which they in consideration of certain conditions are released from their liabilities as individuals, but the joint estate in such case remains in bankruptcy, and is wound up for the benefit of the joint creditors. It will thus be seen that a certain harmony pervades the administration of the bankrupt law in France—a partnership remains an *être moral* distinct from the individuals comprising it. Only the creditors of a bankrupt vote in his estate, and they alone who are his creditors are entitled to grant him his discharge.\*

In England, on the other hand, up to the passing of the Act of 1869, what confusion is apparent in the administration of the bankrupt laws. "From this principle," says Mr. Griffith,† "arose the practice formerly of taking out in cases of partnership failures, several commissions,—a joint commission against the partnership, and separate commissions against the partners; and this was for a long time the almost uniform course, in spite of the difficulties which were often urged against it, of which notice will presently be taken. Sometimes the two commissions were allowed to go on together, the joint assets being under the joint commission, distributed by the joint assignees among the joint creditors, and the surplus handed over, if any, to the assignees under the separate commissions, in the proportions of the interests of the several partners in the joint estate of the firm; and the separate estates being in like manner distributed among the separate creditors of the partners by the separate assignees, and the surplus, if any, handed over to the joint assignees of the firm, if the joint debts were still unpaid, for distribution under the joint commission.

The first difficulty was, that though a joint commission seems to have, in some respects, been founded on the analogy of a joint action, it had some results very far at variance from what would follow strictly from such an origin, at least by direct consequence.

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\* 1 Renouard, p. 410, 441; 2 Renouard, p. 134-139, 141; 2 Namur, p. 519.

† Griffith & Holmes, p. 654.

It seems past doubt that the assignment under a joint commission passed all the property of the bankrupts, not only joint but separate; and a certificate under a joint commission discharged all the debts of all the bankrupts, both joint and separate, as effectually as if each debtor had been bankrupt separately. It would, therefore, seem most inequitable that separate creditors should be excluded from all rights under a joint commission, and practically they were not so excluded, though not allowed in general to prove as creditors under the joint commission. Their rights were at one time, as above remarked, commonly worked out by allowing the subsistence of separate commissions concurrently with the joint commission, though, where any conflict arose between the assignees under any of the commissions and those under another, the result was usually a bill fyled and the superseding of either the separate or the joint commission, with an order to the assignees of the subsisting commission to keep accounts separately of the joint estate and of the separate estates; and to distribute the joint estate first among joint creditors, and separate estates, first among separate creditors, and to transfer the surplus as before-mentioned, in the case of the several commissions subsisting together. At length, by a general order of Lord Loughborough, the course which was, up to that time, ordered in each case on bill fyled was ordered in every case, where a joint commission and separate commissions should be sued out. But even prior to this, separate creditors had often been let in indirectly under joint commissions, for the purpose of being heard, and obtaining dividends out of separate estate, though it does not seem they were ever formally recognized as having the rights of creditors under the commission. They seem to have been looked on more in the light of persons claiming liens on part of the assets than creditors; their presence was necessary to the proper taking of the accounts of the property, strictly speaking to be distributed under the commission; but neither they, nor any other person had, in respect of the joint estate merely, any rights personally under the commission. This was a necessary consequence of the introduction of the doctrine that joint assets were primarily to be applied in the payment of joint debts, separate assets in that of separate debts; for this principle once introduced it became necessary that an account of the separate debts should be taken, in order to see what surplus would remain, if any, of the separate assets applicable to the purpose of answer-

ing joint debts, if the joint assets were insufficient, and, as the payment of the joint debts out of assets applicable for the purpose was the primary object of the joint commission, these accounts were necessarily incident to the working out of the joint commission. This view will, it is believed, explain, at least in part, the cases in which it is said that separate creditors were entitled to be let in under joint commissions. An exactly similar course of argument would seem sufficient to explain the letting in of joint creditors under a separate commission, and *would leave the rights of each set of creditors under the other commission strictly analogous, one to the other*; but it is seen that joint creditors were allowed to vote in the choice of assignees under a separate commission; *an attempt has been made above to explain this anomaly on principle, if indeed it do not rest on mere arbitrary practice*. It may here be remarked that the doctrine that joint debts should be paid out of joint assets in the first instance, and separate debts out of separate assets, is not confined to the administration of estates in the Court of Bankruptcy. It extends to cases where one estate is administered in that Court and the other in Chancery, and would probably be the rule wherever insolvent estates came under administration in this country. . . . . When Lord Thurlow held the Great Seal, strongly impressed with the complexity of the rule as before-mentioned, which gives a priority out of joint assets to joint debts and out of separate assets to separate debts, as well as with the gross injustice worked by it in very many cases, he endeavoured to supersede it; and we find, during his custody of the Seal, that in numerous cases the joint and separate estates were thrown into a common fund and proof allowed against the whole by joint and separate creditors *pari passu*. This practice had, at least, the merit of extreme simplicity, and was no more inequitable than that which it sought to supersede; it had also the advantage that it is the rule in many foreign countries, if not in all, and this is a great advantage where bankruptcies occur in the case of merchants trading abroad, as they rarely occur without some complications arising out of the foreign laws of insolvency, which would be much simplified if our own laws were the same as that of other countries in its essential features. But, as has been seen, the attempt made by Lord Thurlow to establish the new rule failed as soon as his assistance in maintaining it was withdrawn, and Lord Loughborough returned to the former rule,

*which has ever since prevailed.*" \* At p. 661 Mr. Griffiths says: "Though separate creditors had, as is seen, no right to prove for the purpose of voting in the choice of assignees, yet they were in some instances, where the interest of the joint creditors appeared *primâ facie* to be adverse to theirs, allowed to choose an inspector on behalf of the separate estate, and separate creditors alone could vote in the choice of the inspector. This practice is still in some cases continued."

Rule 54 of the orders of the 19th October, 1852, was merely declaratory of the law as it stood at that time, and conferred no right of voting for an assignee under a joint commission upon separate creditors.†

As already shewn (*ante*, p. 182), when the members of a firm entered into a deed of composition and discharge with their creditors, the creditors of every class were entitled to receive the same composition rate on their claims although the assets of one of the estates might have been *nil*.

Under the English system, then, great errors are apparent in the administration of the bankrupt laws up to 1869.

10. The denial of the right of the joint creditors to rank concurrently with the separate creditors on the separate estates of the partners.

20. The denial of the right to the separate creditors of the partners of a firm put into bankruptcy to appoint assignees to their debtor's estate, the right to appoint being vested in the joint creditors.

30. The denial of the right to the separate creditors of a partner to enter into a deed of composition and discharge with him, relieving him from his individual liability.

The second and third errors seem to spring naturally from the first. It therefore becomes necessary to investigate the reasoning upon which is based the English rule, by which separate creditors are privileged over joint creditors upon the assets of separate estates.

One of the chief obligations imposed upon the members of commercial partnerships, and recognized throughout the civilized world is, that "where a partnership liability does exist, whatever

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\* Pages 654-657.

† Griffith & Holmes, p. 663.





In the case of partners it may be taken for granted that in the greater number of cases, their separate estates have been made and realized by their trade so carried on in partnership; that from the business of the partnership is withdrawn the amount of money necessary for the support of their families and themselves, and that if it be not so applied it is added to the separate estates of the partners. To the world at large, moreover, the separate estates of the partners are held out as forming part of the capital of the partnership, and it is not only on the assets of the partnership, but also on the assets of each of the partners, that parties dealing with the firm rely for payment.

It is therefore submitted that neither in law nor in equity, is there any foundation for the arbitrary rule of English practice, now in force in this Dominion under § 64 of the Insolvent Act of 1869.

20. The second error pointed out is to a very great extent based upon the one just now discussed. But very great and manifest injustice is worked in England, by the refusal to allow separate creditors to vote at the nomination of an assignee to their debtor's private estate; it is true that the Courts there had the power of granting the privilege of appointing an inspector to the separate creditors, but the inspector had not the same powers as the assignee, and as the principle of the English Bankrupt Law was that the creditors of a debtor alone had the right of appointing an assignee to his estate, it is impossible to conceive how such a violation of it could possibly have been tolerated.

It would seem to be a principle of the English law, that immediately upon its bankruptcy, a partnership was dissolved, there being no *être moral* as in France, the partners became individually bankrupt, the estate of each being composed of his separate estate and his share in the joint estate, his creditors being his separate creditors and those of the extinct partnership. Thus A & B being in partnership, A's creditors after the bankruptcy would be his separate creditors and those of the firm; B's his separate creditors and those of the firm, A's assets would be composed of his separate estate and his share in the joint estate, whilst B's would consist of his separate, and his share of the joint estate. But B's separate creditors would not be creditors of A, nor would A's creditors be creditors of B, so that it is clear that neither A's nor B's creditors had, under a joint commission, the right of voting in the nomination of an assignee to the joint

estate, as thereby they would vote for and aid in the appointment of an assignee to the estate of a person who was not their debtor, and on whom they had no claim. Consequently the denial of the right of separate creditors to vote on the appointment of an assignee to the joint estate can be justified.

But a system which thus works injustice to the class of separate creditors, must be bottomed in error. The assignee of a bankrupt is a mere trustee for the creditors.\* But clearly there should be vested in all the creditors of a bankrupt the right of voting for the appointment of such trustees, and any system which deprives a class of such right is inequitable and unjust.

The French system is evidently more equitable and just, and it may be with truth asserted that therein are not to be found the glaring discrepancies which disfigure the English practice. In France the carrying into practice of the principles of the bankrupt code is easy; there is no necessity for recurring to the extraordinary shifts, which have been introduced in England, in order to get over the difficulties produced by starting from a wrong ground of departure.

It would be far better in this Dominion were our legislators not attached so servilely to the principles of the common law, and the rules of English procedure. In mercantile matters, especially, for though it is now admitted that Bracton drew largely from the civil law commentators, Lord Mansfield, who is justly looked upon as the original moulder of the English commercial law, borrowed from the *Ordonnance de Commerce* many of the principles which adorn his judgments.

But if the fact that neither in England nor in Canada is the *être moral* of a partnership recognized, presents insuperable obstacles in the way of adopting the French system, there is nothing to prevent the placing the working in harmony with the principles of the insolvent law. Therefore as the insolvent law of Canada does evidently recognize the fact that so soon as a partnership is put into insolvency, the members thereof become individually insolvent, the *être moral* previously existing (if any), vanishing into thin air, the proper course to follow would be to hold in lieu of a meeting of joint creditors and of the separate creditors of the partners, the whole voting *en bloc* for the appointment of an assignee to the joint estate, as is the practice at present, for the

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\* Griffith & Holmes, p. 280, and auth. cited, note (c).

creditors of each partner, viz. the joint creditors of the firm and his separate creditors to vote at such meeting for the appointment of an assignee to each estate, and in the event of the same assignee not being appointed to the estates of all the partners, such assignees to hold jointly the assets of the firm in trust for the joint creditors.

30. The difficulties which surround the making of a valid deed of composition and discharge in matters of partnership are traceable to the rule already discussed of "to each estate the payment of its own debts by privilege." Under the English system, in the words of a recent writer on Composition Deeds, "the effect of these decisions on composition deeds is to render it doubtful whether any valid deed can be made by a member of a partnership if he has separate creditors, if the deed operates as a release of debts."\*

The first principle maintained, as already shewn, *ante* p. 182, was that perfect equality, so far as the composition was concerned, should reign amongst *all* the creditors of the insolvent or insolvents entering into such deed, consequently when two persons who had been in partnership together entered into a deed of composition and discharge with their creditors, the joint creditors of the firm and the separate creditors of each partner had to become, in requisite majority, parties to the deed, and all receive the same composition rate, although the different estates were of different values. Thus A & B were partners and became bankrupt. The joint estate was worth 10s. in the £ of the liabilities, A's private estate 5s. in the £, and B's private estate 2s. in the £ on its liabilities. Wound up in bankruptcy, the joint creditors would receive say 10s., A's creditors 5s., and B's 2s. in the £. But if the partners wished to execute a joint deed of composition and discharge with their creditors and recover their joint and separate estates, the composition based upon the aggregate value of the estates would entail a loss upon the joint and in all probability confer a benefit on the separate creditors. In justification of the ruling it was pretended that the value of the estates should not be the measure of the composition, as a third person might pay a composition in order to free the bankrupt from his liability to his creditors,† and thereby creditors might obtain a larger dividend than if the estate were wound up

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\* Sills on Com. Deeds, p 20.

† Walker vs. Nevill, 3 H. & C. 416.

in bankruptcy. But experience shows clearly that as a general rule the value of the estate is the measure of the composition, and creditors expect to receive from their debtors entering into a composition with them as nearly as possible the value of the estate, be it separate or joint, on which they have privileged claims, a small deduction being made for the expenses of realization. If then the rule in matters of bankrupt partnerships that each estate is to pay its own debts by privilege is to be maintained, our law in the matter of composition and discharge requires reform to place it in harmony with the other portions of the Insolvent Act.

As the law at present stands it would seem as if in the cases of insolvent partnerships but two courses are open to the insolvents and their creditors.

10. To place the creditors of the firm and the separate creditors of the partners on the same footing as regards the composition, the majority of creditors in such case being the requisite majority in number and value of all such creditors regarded but as one *masse*.\*

20. To treat each partner as individually insolvent, the deed of composition and discharge being entered into between him and the joint creditors and his own separate creditors, all being placed upon the same footing as regards the composition. The said deed not to contain any reconveyance of either estate to the insolvent, but be merely a discharge from his liabilities, the estates to remain in insolvency. In such case, a sale of any or all of the estates might be effected to the insolvent after his discharge under the provisions of §42.

By adopting the course lastly pointed out, the commission of injustice would be avoided and the difficulties now surrounding composition and discharge in matters of partnership be removed.

WILLIAM H. KERR.

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\* Walker vs. Neville, 3 H. & C. 403.

## WILLS AND INTESTACY.

The increased intercourse between the different Provinces of the Dominion brought about by Confederation, renders desirable a more general knowledge of the differences between them in the laws regulating the ordinary transactions of life. The business man from Ontario would be very apt to suppose that what he could do and would do in Ontario would under similar circumstances be a rule of conduct for him in Nova Scotia and New Brunswick. The same of the business man from Nova Scotia or New Brunswick in Ontario. Called by the pursuits of trade to take up his temporary or permanent residence in one of the provinces other than that in which he had been previously living, it is important to know how the wealth he is accumulating may be disposed of by himself; or if he failed to will it, how the law would do it for him. There are few things more ruinous to the peace of families than a disputed will; few more conducive to the well-being of a people than a judicious law of intestacy. It is proposed to examine the provisions made in Ontario, New Brunswick, and Nova Scotia in these respects.

## FIRST AS TO WILLS.

In *New Brunswick*, a testator may, by his will, dispose of all property, and rights of property, real and personal, in possession or expectancy, corporeal or incorporeal, contingent or otherwise, to which he is entitled, either in law or equity, at the time of the execution of his will, or to which he may expect to become at any time entitled or be entitled to at the time of his death, whether such rights or property have accrued to him before or after the execution of his will.

In *Nova Scotia*, the same.

In *Ontario*, there is no provision of this general character, but by the Consolidated Statutes of Upper Canada, chapter 82, section 11, real estate, acquired subsequently to the execution of a will, would pass under a devise conveying such real estate as testator might die possessed of.

In *New Brunswick* and *Nova Scotia*, a testator must be twenty-one years of age.

In *Ontario*, there is no provision to this effect.

In *Nova Scotia*, a married woman may, with the consent of her husband testified in writing, make a will of her personal property; a will of real and personal property to which she may be entitled in her own right, or for her separate use, and wills in a representative character. The last three, not in the language of the statute having the husband's assent appended to the clause.

It is presumed there must have been in *Nova Scotia* some judicial construction upon this section.

In *New Brunswick*, a married woman's right to make a will is left exactly as it was before passing of the Act, chapter 110, 1st volume Revised Statutes, 1854, and the husband's assent is therefore requisite, except in case of desertion by her husband, when the right of disposal of property acquired by herself after desertion without his assent, might be presumed from 3rd section, chapter 114, 1st volume Revised Statutes "of the real and personal property of married women."

On this latter point, however, all doubt has since been removed, and the power greatly extended by Act of 1869, chapter 33rd.

In *Ontario*, it is specifically enacted that after the 4th May, 1859, a married woman may make a will, in presence of two witnesses—neither of whom is her husband—of her separate property, real and personal, to her children, and failing issue, then to her husband, or as she may see fit, as if *sole*; but husband's tenancy by the courtesy is not to be affected. Consolidated Statutes, Upper Canada, 794, 22 Vict., chapter 73, section 15.

The mode of the execution of wills in *New Brunswick* and *Nova Scotia* is the same. They must be in writing, executed by the testator at the foot thereof, or his signature thereto acknowledged by him in the presence of two witnesses, present at the same time, and attesting in his presence and the presence of each other; but in *New Brunswick*, there is a further provision that though not signed at the foot thereof, its execution shall be deemed good, if it be apparent, from the will and position of the signature, or from the evidence of the witnesses thereto, that testator intended it as his last will.

In *Ontario*, there is no general statute as in *Nova Scotia* and *New Brunswick*, with reference to wills; but in the Consolidated Statutes, Upper Canada, chapter 82, section 13, it is provided

that any wills affecting lands, executed after 6th March, 1834, in the presence of and attested by two witnesses, shall be as valid as if in the presence of three, and attested by three, and it is sufficient if such witnesses subscribe in presence of each other, though not in the presence of the testator; in this latter respect differing from the laws of the other Provinces as well as from the law of England.

The Imperial Act of 7th, William IV. and 1st, Victoria, chapter 26, in amendment of the law with respect to wills, puts an end to the power existing under the pre-existing law, which infants male at 14, and infants female at 12, had of disposing by will of personal property (*vide Jarman*); but as this Statute does not operate in Canada, and there is no local Act on the subject, the law in this respect, in Ontario, differs from the law in New Brunswick and Nova Scotia.

In *New Brunswick* and *Nova Scotia*, soldiers in service and seamen at sea may dispose of their personal estate as before, and in Ontario, by section 83, chapter 16, the Act regulating Surrogate Courts, the same provision is made with reference to soldiers and seamen, with addition that no nuncupative will made after that Act came in force should be good (5th December, 1859); this latter provision was not necessary in New Brunswick and Nova Scotia, as it was there enacted that all wills should be in writing, saving the exception just named.

In *New Brunswick* and *Nova Scotia*, wills executed as provided under their Statutes, are valid without publication.

In *Ontario*, there is no such statutory provision. (Memo. It has been held in England that it is not necessary—though Hardwick, Chancellor, had previously decided that it was—of freehold lands. *Vide Jarman*, 1st volume, 74.)

In *New Brunswick* and *Nova Scotia*, incompetency of witnesses (by reason of interest arising from devise or legacy) to the execution of the will has been removed. The will is not thereby rendered invalid or incapable of proof. The witnesses are admitted, and, if proved, the will is declared valid; but the devise or legacy is made void, even if it be to the husband or wife of witness.

In *Ontario*, there is no statutory provision of this character (the Act, chapter 13, 1869, of the Ontario Legislation to amend the Law considered below); and while the Imperial Act 25th George II., chapter 6, which makes void the devise or legacy to the witness himself is in operation in Ontario, the 1st Victoria,

chapter 26, extending the same consequence to a devise to the wife or husband of the witness, is not.

In *New Brunswick*, creditors, whose debts are by the will charged upon the estate, are not incompetent as witnesses.

In *Nova Scotia*, similar provision.

In *Ontario*, none, but would come in under George II., chapter 6.

In *New Brunswick*, no witness is rendered incompetent by reason of his being declared executor.

In *Nova Scotia*, the same.

In *Ontario*, no similar provision.

In both *New Brunswick* and *Nova Scotia*, objections as to the competency of witnesses in all legal proceedings (and, therefore, necessarily in the proof of wills) arising from interest or crime have long been removed by the Acts allowing parties to a cause to be witnesses; but those Acts in no way affect the provisions in the Acts relating to wills which declare legacies and devises to such parties void.

In *Ontario*, the law on this subject is apparently in a somewhat anomalous position. There are no such provisions relating to wills in any of the statutes which refer to wills, and it may be a question whether under the Act passed by the Ontario Legislature in December, 1869, entitled: "An Act to amend the Law of Evidence in Civil Cases," which removes the incompetency of witnesses arising from crime or interest, the difficulty of the question would be removed.

Under the English Law as prevailing before 1st Victoria, chapter 26, whether a will of freehold estate attested by a witness whose wife or husband had an interest in the will as devisee or legatee, would be invalid or not, was to some degree uncertain, though if the devise or legacy had been to the witness himself, under 25th George II, chapter 6, the doubt as to the invalidity is removed, because it clearly makes him competent, and declares the devise or legacy void. The Statute, 1st Victoria, chapter 26, repealed the 25th George II, chapter 6, except as to the Colonies in America, extended the removal of the incompetency of the witness, and the forfeiture of the devise and legacy to the husband or wife of the witness as well as to the witness himself, and to personal estate as well as to real estate (it having been decided that the 25th George II, chapter 6, did not extend to wills of personal estate), but the 1st Victoria, chapter 26, is not



in force in Ontario, and equivalent provisions to those in New Brunswick and Nova Scotia have never been enacted in Ontario.

The Statute of Ontario of December, 1869, which admits an interested witness to give evidence, says nothing about devises or legacies to witnesses to wills being void. Thus, in the absence of any knowledge, as to what may have been done by the Courts of Upper Canada on this subject, it would appear that on the first point as to the validity or invalidity of a will of freehold, witnessed by one to whose wife or husband a devise or legacy has been left (under the Statute, George II), the question remains open; secondly, if the devise or legacy was to the husband or wife of the witness, it would not be affected at all if the will was sustained; and thirdly, it having been decided that the statute did not apply to personal property, a person directly interested by a legacy to himself, or his wife, in sustaining a will, may be admitted as a witness to prove the will creating the interest without forfeiting or affecting the legacy—a principle inconsistent with the policy of the same Act (Ontario, December, 1869), which, while allowing parties to a cause, or interested in its results, to give testimony in their own favour, yet, in an action brought by or against executors or administrators, excludes the testimony of the survivor, as to what may have been said or done to him by the deceased, whose representatives are the other party to the suit; thus, the testator being dead, a claimant who is a witness to a will of personal property, might prove the document, giving to himself or his wife £500; but in a suit brought by him to recover £5 from the testator's estate, he would not be admissible as a witness to prove that the testator promised to pay him £5.

The 1st Victoria, chapter 26, has been substantially re-enacted in New Brunswick and Nova Scotia; not so in Ontario.

The revocation of a will by a subsequent marriage, and its non-revocation by a change of circumstances, or otherwise, than by a will or codicil duly made, is the same in all three Provinces.

In *New Brunswick* and *Nova Scotia*, obliterations, interlineations, or alterations made in a will after its execution (except when the words or effect of the will before alteration is not apparent) shall have no effect, unless alteration is executed as required for a will; and no will or codicil which has been revoked is to be revived, otherwise than by a duly executed will or codicil reviving it.

In *Ontario* no such provisions.

In all three Provinces, a conveyance of a part of an estate made after the execution of a will, is not to affect the operation of the will upon the part not conveyed.

In *Ontario* and *New Brunswick*, both with reference to real and personal estate, the will is to be construed as if executed immediately before the death of the testator.

In *Nova Scotia* the same provision exists, and there is also a clause that executors are to be trustees for the conveyance of real or personal property contracted to be sold, though the same may have been disposed of in the will.

In *New Brunswick* and *Ontario*, there is no clause of this latter character. Such a case would be left to the operation of law either by a bill for specific performance, or an action on the contract for damages.

In *New Brunswick* and *Nova Scotia*, specific provisions are made, that devises failing, become part of the residuary estate; a devise of freehold to comprehend leasehold, when no freehold existed answering the description in the will; and the provisions with reference to the execution of powers of appointment as to real and personal estate are the same in both Provinces.

In *Ontario*, none.

In all three Provinces it is provided that devises of real estate without words of limitation, pass the freehold or the entire estate of the testator, unless the contrary clearly appears from the will.

In *New Brunswick* and *Nova Scotia*, similar provisions with reference to the lapsing of estates-tail or quasi-entail, in case of the death of the devisee during the lifetime of the testator, leaving inheritable issue, are made, declaring that such devise shall not lapse, but take effect as if the death of the devisee had happened immediately after the death of the testator.

In *Ontario*, none.

In *New Brunswick*, there is an express provision that a devise of real estate to a trustee without any express limitation of the estate to be taken by him, and without any remainder over after the trust has been executed, shall vest in the trustee the fee simple or other entire legal estate of the testator, and not an estate determinable after the trust has been satisfied.

In *Nova Scotia* and *Ontario* there is no such provision.

In *New Brunswick* and *Nova Scotia*, provision is made that a devise to a child, who dies in the lifetime of the testator leaving issue, shall enure to the benefit of the issue.

In *Ontario*, none.

In *New Brunswick* and *Nova Scotia*, provisions are made for the construction of the words in a will.

In *Ontario*, none.

In the three Provinces, wills affecting lands must be registered ; but the term within which a subsequent purchaser may be affected by the non-registration varies in each.

In *New Brunswick*, if there has been suppression, or concealment, or delay arising from the will being contested, under certain circumstances the term varies from six months to three years.

In *Ontario*, under the Registry Act, 1868, chapter 20, to affect subsequent purchasers, wills must be registered within twelve months next after the death of the deviser, testator or testatrix, or in case the devisee is disabled from registering the will within the said time, by reason of its being contested, or other inevitable difficulty, without his or her wilful default or neglect, then within twelve months after attainment of the will or probate, or removal of the impediment preventing the registration.

In *Nova Scotia* there are no exceptions or provisions of this character ; but there is a provision, that for the suppression of a will, there shall be a forfeiture of £5 for every month " the offender shall suppress a will after the lapse of the first thirty days." (Section 28.)

In *New Brunswick*, there is the same penalty of £5 for any person guilty of suppressing a will, in the Act regulating Courts of Probate ; or if the executor does not prove and cause the will to be registered, or renounce his executorship within thirty days after the death of the deceased without just excuse for the default.

In all three Provinces, stealing or fraudulently suppressing or destroying a will is provided for under the head of Crimes.

In Quebec the law respecting Wills is in part laid down in the Civil Code as follows :—

Art. 831. Every person of full age, of sound intellect, and capable of alienating his property, may dispose of it freely by will, without distinction as to its origin or nature, either in favour of his consort or of one or more of his children, or of any other person capable of acquiring and possessing, and without reserve, restriction, or limitation ; saving the prohibitions, restrictions, and causes of nullity mentioned in this code, and all dispositions and conditions contrary to public order or good morals.

Art. 184. A wife may make a will without the authorization of her husband.

Art. 842. Wills may be made : 1. In notarial or authentic form ; 2. In the form required for holograph wills ; 3. In writing and in presence of witnesses, in the form derived from the laws of England.

Art. 843. Wills in notarial or authentic form are received before two notaries, or before a notary and two witnesses ; the testator, in their presence and with them, signs the will or declares that he cannot do so, after it has been read to him by one of the notaries in presence of the other, or by the notary in presence of the witnesses. Mention is made in the will of the observance of the formalities.

Art. 844. Authentic wills must be made as originals remaining with the notary. The witnesses must be named and described in the will. They must be of the male sex, of full age, and must not be civilly dead, nor sentenced to an infamous punishment. Aliens may serve as witnesses. The clerks and servants of the notaries cannot. The date and place of its execution must be stated in the will.

Art. 845. A will cannot be executed before notaries who are related or allied to the testator or to each other, in the direct line, or in the degree of brothers, uncles, or nephews. The witnesses, however, may be related or allied to the testator, to the notary, or to one another.

Art. 849. Wills made in Lower Canada, or elsewhere, by military men in active service out of garrison, or by mariners during voyages, on board ship, or in hospital, which would be valid in England as regards their form, are likewise valid in Lower Canada.

Art. 850. Holograph wills must be wholly written and signed by the testator, and require neither notaries nor witnesses. They are subject to no particular form. Deaf mutes who are sufficiently educated, may make holograph wills, in the same manner as other persons who know how to write.

Art. 851. Wills made in the form derived from the laws of England (whether they affect moveable or immoveable property), must be in writing, and signed at the end with the signature or mark of the testator, made by himself or by another person for him in his presence, and under his express direction (which signature is then or subsequently acknowledged by the testator as having been subscribed by him to his will then produced, in presence of at least two competent witnesses together, who attest and sign the will immediately, in presence of the testator and at his request. Females may serve as attesting witnesses, and the rules concerning the competency of witnesses are the same in all other respects as for wills in authentic form.

Art. 853. In wills made in the last mentioned form, legacies made to any of the witnesses, or to the husband or wife of any such witness, or to any relations of such witness (in the first degree) are void, but do not annul the other provisions of the will. The competency of testamentary executors to serve as witnesses to such wills, is subject to the same rules as in wills in authentic form.

Art. 846. Legacies made in favour of the notaries or witnesses, or to the wife of any such notary or witness, or to any relation of

such notary or witness in the first degree, are void, but do not annul the other provisions of the will. Testamentary executors, who are neither benefitted nor compensated by the will, may serve as witnesses to its execution.

Art. 2098. All acts *inter vivos*, conveying the ownership of an immoveable, must be registered at length or by memorial. In default of such registration, the title of conveyance cannot be invoked against any third party who has purchased the same property from the same vendor for a valuable consideration and whose title is registered.

Registration has the same effect between two donees of the same immoveable.

Every conveyance by will of an immoveable must be registered either at length or by memorial with a declaration of the date of the death of the testator.

## SECONDLY AS TO INTESTACY.

### *Real and Personal Estate.*

In New Brunswick, the Act regulating Intestate's Estates is extremely short.

21st Vic., cap. 26, as explained by 22 Vic., cap. 25, A.D. 1858 and 1859.

### *As to Real Estate.*

*The Real Estate* is to be divided equally (regard being had to advancements made before his death by the Intestate, so as to make all equal) amongst the children or their legal representatives, including in the distribution, children of the half blood, reserving the widow's right as dower.

In case there be no children of the Intestate, then the next of kindred in equal degree and their representatives.

*The Personal Estate* (1st Vol. Rev. Stat. 283,) is apportioned one-third ( $\frac{1}{3}$ ) to widow, residue in equal proportions among children and their representatives (*per stirpes*). The heir-at-law, notwithstanding an advancement to him of Real Estate by Intestate in his lifetime, shall nevertheless receive an equal share with the other children; but any other child having received any such advancement, shall be entitled only to such equal share, deducting the value of his advancement.

(*Memo.*) This is the only difference at present existing in favor of the heir-at-law, and probably escaped attention when 21st Vic., cap. 26, was passed.) If there be no children, or legal representatives of them, one-half goes to the widow, the residue equally

to next of kin, in equal degree, and their representatives; but no representation among collaterals after brother's and sister's children.

If no widow, equally among children, and if no widow and no children, to next of kin in equal degree. (Same as 22, 23 Charles II, cap. 10, as explained by 29 Charles II, cap. 30.)

If after the death of the father, any of his children shall die in the lifetime of the mother, intestate without wife or children, every brother and sister and their representatives shall have equal share *with the mother*. (Same as 1st James II, cap. 17, differing in this respect from Real Estate.)

In *Ontario*. Con. Stat. cap. 82, p. 829. The Real Estate, in case of Intestacy, goes:

1st. To children and their representatives, *per stirpes* in equal parts.

2nd. If Intestate dies without descendants, *leaving a father*, the estate will go to the father, unless the Intestate acquired it on the part of the mother, and she be living, and if *such* mother be dead, then the estate so acquired goes to the father for life, reversion to the brothers and sisters; if no brothers or sisters, or descendants, &c., to father absolutely.—Sec. 27.

If Intestate die without descendants, and without a father (or a father entitled, as under the last section), and leaving a mother, and a brother or sister, then the estate goes to the mother for life, reversion to the brother or sister, or their descendants, &c.; and if no brother or sister, or descendants of any, then to mother absolutely.—Sec. 28.

If Intestate dies without descendants, and without father or mother, then estate goes to brothers and sisters, and their descendants, *per stirpes*, however remote.—Sects. 29, 30, 31.

If no heirs, under any of the preceding sections, then the estate, if acquired on the father's side, shall go to the brothers and sisters of the father of the Intestate, and their descendants, in equal shares, *per stirpes* (or their descendants); and if none on the father's side, then to those on the mother's side.—Sects. 32, 33.

If the estate should have come on the mother's side, failing heirs, &c., then to the brothers and sisters of the mother, and their descendants, *per stirpes*, in equal shares, &c.; and if none on the mother's side, then to those on the father's side.—Sect. 34.

If acquired neither on father or mother's side (failing *ut ante*), then estate shall go to brothers and sisters of father and mother, alike, and their representatives, *per stirpes*.—Sec. 35.

Half blood succeeds with whole-blood.—Sec. 36.

And, failing heirs, under all those Sections, the estate goes to next of kin, according to the rules of the English Statute of Distribution of Personal Estate.—Sec. 37.

Posthumous children to inherit as if born in lifetime.—Sec. 39.

*With respect to Real Estate.*

The law of New Brunswick differs from that of Ontario in this, that while the Law of Ontario, in case of failure of lineal descendants, provides, specifically, that the estate shall go to the father or mother, or their representatives, *quoad*, the fact, from whom the estate may have been derived; the New Brunswick Law simply provides, "that in case there be no children of the "Intestate, then it shall go to the next of kindred, in equal "degree, and their representatives."

The next of kindred would be determined by the Civil Law, and is the same as in the distribution of Personal Estate, (under 22nd and 23rd Charles II., cap. 10, as explained by 29, Charles II., cap. 30 in England, and in New Brunswick by 1st vol. Revd. Stat., page 283). And, therefore, the *mother*, as well as the father, would conjointly succeed to the Real Estate of the deceased (inasmuch, as they, being next of kin *in equal* degree, would succeed to the Personal Estate of the Intestate, who, leaving no widow, died without issue, in exclusion of his brothers and sisters); and, assuming the father was dead, she, being the nearest of kin, according to the Civil Law, would be entitled to the whole.

(The Stat. of 1st James II., cap. 17, which provides, that the father being dead, the mother, and brother and sisters, shall share alike, applies only to Personal Estate, and in no way alters the Rule as to who next of kin may be under the Civil Law, so that with reference to Real Estate in New Brunswick, the mother is in a better position than she is with reference to Personal Estate.)

*As to Personal Property.*

The Law in Ontario and New Brunswick is the same; the Stat. 22 & 23 Charles II. cap. 30, modified by 1st James II.,

cap. 17, prevailing in Ontario under the Act respecting property and Civil Rights (chap. 9, page 30, Cons Stat.); and in New Brunswick by specific re-enactments of their several provisions.

*The Nova Scotia law differs from both,—See Revised Statutes, 3rd series, 747.*

*With reference to Real Estate.*

1st. It first provides for an equal distribution among children and their descendants, *per stirpes*.

2nd. If no children, one half of Real Estate goes to father; the other half to widow, in lieu of dower; if no widow, all to father.

3rd. If no children and no father, one-half to widow; the other half, in equal shares, to his mother, brothers and sisters, and their representatives, and failing all these, then to next of kin, in equal degree. If there be no kindred, all to widow for her own use, if there be one. Minors unmarried, without father or mother, property to brothers and sisters in equal degree.

The Civil Law to prevail, and half-blood to inherit with whole-blood.

*With reference to Personal Property.*

1st. Widow has all her paraphernalia, apparel, ornaments, apparel of minor children, and provisions for 90 days, and such other necessities as shall be allowed by Judge of Probate, deceased's wearing apparel, to \$40 value, to be distributed among family by the administrator.

2nd. Residue of Personal Estate, after payment of the debts of deceased, &c., to be distributed, one-third to widow, residue to persons entitled to the Real Estate, and if no widow, all residue to the latter. (Changed from one-half, R.S. 747, to  $\frac{1}{3}$  by Amend. Stats., 1865, chap. 3.)

3rd. There is a provision under the Law relating to Intestacy, that a posthumous child, unprovided for by the Testator in his will, shall have the same interest in the estate, both Real and Personal of the father, as if *the father had died intestate*, and for such purposes, all the devises and bequests made in the will shall abate proportionably.

4th. Advancements to be taken into consideration in the apportionment, and if exceeding the proportion, that would come to the child on a division, he is to be excluded from the division, but cannot be called on to refund.



5th. All gifts and grants are to be deemed advancements, if stated to be so made in the gift or grant, if charged in writing as such, or acknowledged in writing, or on examination before the Judge of Probate on oath, and not otherwise.

6th.—Tenancy by courtesy, or of a widow in dower, not affected.

*Of both Real and Personal Property*, by amended Statutes of 1865, chap. 3, sec. 2.—“If a married woman shall die intestate, without issue surviving, one-half of the Real and Personal Estate owned by her, in her own right, or held by her for her separate use, shall go to her husband, and the other half to her father; if she have no father, then to her mother, brothers and sisters, in equal shares; and the children of any deceased brother or sister, by right of representation, and if there be no issue, father, mother, brother or sister, or child of brother or sister, the whole shall go to her husband.”

In the Province of Quebec the law respecting Intestacy is thus laid down in the Civil Code:—

Art. 625. Children or their descendants succeed to their father and mother, grandfathers and grandmothers, or other ascendants, without distinction of sex or primogeniture, and whether they are the issue of the same or of different marriages.

They inherit in equal portions and by heads when they are all in the same degree and in their own right; they inherit by roots when all, or some of them, come by representation.

Art. 626. If a person dying without issue, leave his father and mother, and also brothers or sisters, or nephews or nieces in the first degree, the succession is divided into two equal portions, one of which devolves to the father and mother, who share it equally, and the other to the brothers and sisters, nephews and nieces of the deceased, according to the rules laid down in the following section:

Art. 627. If, in the case of the preceding article, the father or mother had previously died, the share he or she would have received accrues to the survivor of them.

Art. 629. In the case of the preceding article, the succession is divided equally between the ascendants of the paternal line and those of the maternal line. The ascendant nearest in degree takes the half accruing to his line to the exclusion of all others.

Ascendants in the same degree inherit by heads in their line.

Art. 630. Ascendants inherit, to the exclusion of all others, property given by them to their children or other descendants who die without issue, where the objects given are still in kind in the succession, and if they have been alienated, the price, if still due, accrues to such ascendants.

They also inherit the right which the donee may have had of resuming the property thus given.

Art. 631. If the father and mother of a person dying without issue, or one of them, have survived him, his brothers and sisters, as well as his nephews and nieces in the first degree, are entitled to one-half of the succession.

Art. 632. If both father and mother have previously died, the brothers, sisters, and nephews and nieces in the first degree, of the deceased, succeed to him, to the exclusion of the ascendants and the other collaterals. They succeed either in their own right, or by representation.

Art. 633. The division of the half or of the whole of the succession coming to the brothers, sisters, nephews or nieces, according to the terms of the two preceding articles, is effected in equal portions among them, if they be all born of the same marriage; if they be the issue of different marriages, an equal division is made between the two lines paternal and maternal of the deceased, those of the whole blood sharing in each line, and those of the half blood sharing each in his own line only. If there be brothers and sisters, nephews and nieces, on one side only, they inherit the whole of the succession to the exclusion of all the relations of the other line.

Art. 634. If the deceased, having left no issue, nor father nor mother, nor brothers, nor sisters, nor nephews, nor nieces in the first degree, leave ascendants in one line only, the nearest of such ascendants takes one-half of the succession, the other half of which devolves to the nearest collateral relation of the other line. If, in the same case, there be no ascendant, the whole succession is divided into two equal portions, one of which devolves to the nearest collateral relation of the paternal line, and the other to the nearest of the maternal line. Among collaterals, saving the case of representation, the nearest excludes all the others; those who are in the same degree partake by heads.

Art. 935. Relations beyond the twelfth degree do not inherit. In default of relations within the heritable degree in one line, the relations of the other line inherit the whole.

Art. 636. When the deceased leaves no relations within the heritable degree, his succession belongs to his surviving consort.

Art. 637. In default of a surviving consort, the succession falls to the Crown.

Art. 2098. The transmission of immoveables by succession must be registered by means of a declaration setting forth the name of the heir, his degree of relationship to the deceased, the name of the latter, the date of his death, and, lastly, the designation of the immoveable.

So long as the right of the purchaser has not been registered, all conveyances, transfers, hypothecs or real rights granted by him in respect of such immoveable are without effect.

J. H. GRAY.

## CONSTITUTIONAL LAW.

## CHURCH AND STATE.

In every country and in every age, among the heathen as well under the sway of nations professing Christianity, two powers have almost continually disputed for supremacy over mankind. This endless struggle has lately been renewed before the Courts of this Province in an important cause between the Catholic Bishop of Montreal and the *Institut Canadien*, which has been decided by the recognizance of exclusive ecclesiastical jurisdiction in spiritual matters. The reader will perceive that we allude to the cause of Dame Henriette Brown, widow Guibord, and the *Curé* and Churchwardens of the Parish of Montreal. Passing over the details of this memorable conflict, the fundamental point was whether or no the Catholic Church—whose cemeteries are by ancient usage divided into two parts, one for the burial of the non-Catholics, the other for the burial of those recognized by the authorities of the Church as in her communion at the hour of death—is amenable to the civil tribunals for her refusal to bury in the Catholic section (in consecrated or unconsecrated ground), as also for the motives of such refusal. A desire to collect the doctrine established by the judges' decision in this *cause célèbre*, better known under the name of the *Guibord* case, has led us to examine in the following articles the civil status of all the Churches in Canada, 1st in spiritual matters, and 2nd in temporal and mixed matters.

## I. IN SPIRITUAL MATTERS.

In France, before the principles of the Revolution of 1793 came into force, the ecclesiastical authorities of the Roman Catholic Church, the only church recognized or tolerated by the State, were undoubtedly, and without excepting the Pope himself, subject to the jurisdiction of the civil courts in matters purely spiritual. The French King, as a Catholic Prince, protector of the faith, and eldest son of the Church, regarded himself as supreme judge of the maxims and canons of the Catholic Church, and consequently decided upon the validity of the decisions and

decrees of the ecclesiastical authorities, upon appeal from them to the civil tribunals—an appeal known as *l'appel comme d'abus aux parlements*. This controlling power was not only claimed openly by the civil authority, but was acquiesced in and supported by the French or Gallican clergy. The articles of that clergy's declaration of the 19th March, 1682, are a complete proof of our assertion :

Art 4. Quoique le Pape ait la principale part dans les questions de foi et que ses décrets regardent toutes les Eglises et chaque Eglise en particulier, son jugement n'est pas irréfutable, si le consentement de l'Eglise n'intervient. Ce sont les maximes que nous avons reçues de nos pères et que nous avons arrêtés d'envoyer à toutes les Eglises Gallicanes et aux Evêques que le Saint Esprit y a établis pour les gouverner, afin que nous disions tous la même chose, que nous soyons tous dans les mêmes sentiments et que nous tenions tous la même doctrine.

The decisions of the French Courts go still farther than the Declaration of 1682. Mr. Joseph Doutre, Q.C., of counsel in the Guibord case, has gathered together in his elaborate argument a great number of decisions of the French tribunals of so extraordinary a character that we cannot refrain from quoting them as historical curiosities.

ARRÊTS DE DES MAISONS. Vo. Excommunication, en 1662, l'Evêque de Clermont envoya un prêtre avertir le Lieutenant Criminel et le Procureur du Roi de ne point recevoir la communion pascalle, vu qu'ils avaient mis la main sur un prêtre, avec violence et blessure, pendant qu'ils l'arrêtaient pour la commission d'un crime. L'evêque leur faisait ainsi intimer qu'ils avaient par là encouru *ipso facto* l'excommunication, mais il ne la prononçait pas lui-même. Ces deux officiers prenant cet avertissement comme une excommunication et une entreprise sur l'autorité du Roi, interjetèrent appel comme d'abus, comme d'une excommunication. L'avocat général Bignon soutint l'appel et il s'appuya d'un arrêt dont l'espèce était presque semblable, rendu au Parlement d'Aix, contre le Cardinal de Sourdis, archevêque de la même ville, qui fut condamné à une somme de 2,000 écus de réparation envers un officier qu'il avait excommunié, s'il ne levait pas l'excommunication durant le même jour. La Cour reçut le Procureur Général appelant comme d'abus de la prétendue excommunication et sur icelle appointa les parties au conseil.

ARRÊTS DE BRILLION. Vo. Excommunication. No. 3. "Charlemagne dans ses capitulaires fait défense aux prélats d'user d'excommunication, sans de fortes raisons et causes légitimes.

"Le Sieur de Joinville écrit que le Roi St. Louis, répondant à quelques prélats qui imploraient son autorité pour maintenir leurs com-

munications, dit : " Je le ferai volontiers, mais il faut que mes officiers connaissent si la cause de l'excommunication est légitime."

" Sous le règne de Charles VI, le Parlement de Paris par arrêt du 10 Sept. 1407 déclara nulle et abusive la bulle d'excommunication de Benoît XIII, fulminée contre ceux qui s'opposaient aux vacances et aux annates qu'il voulait exiger sur le clergé et ordonna que les excommuniés seraient absous et relaxés.

" L'interdit que le Pape Martin V avait fulminé contre la ville de Lyon fut déclaré nul et abusif, par arrêt de l'an 1422.

" Charles VII, en 1440 défend aux cours du Parlement de laisser publier des censures et excommunications contre les Pairs et Officiers.

" L'excommunication lancée par Innocent VIII contre les habitants de Gand et de Bruxelles et autres flamands, à la sollicitation même de leur comte, fut déclarée nulle par arrêt du Parlement, le 18 mai, 1488.

" Charles IX par l'Ordonnance d'Orléans, Art. 18 défend les excommunications sinon pour crime et scandale public et affaires de grande importance, et par son édit de 1571, il restreint les excommunications et révoque la coutume de porter certaines censures.

No. 4 Le Parlement a modéré la rigueur des Canons en certains cas, rapportés au t., 1er p. 79 de la bibliothèque canonique.

" Avant que les appels comme d'abus fussent introduits, si les évêques abusaient de leur pouvoir par des excommunications injustes, leur temporel était saisi sous l'autorité des cours et eux condamnés à l'amende.

No. 5. Arrêt du parlement de Provence, déclarant que le juge d'Eglise ne peut excommunier que pour cause juste et de conséquence.

No. 9. Arrêt du 15 mars 1409 qui condamne l'Archevêque de Rheims, sur peine de saisie de son temporel de faire absoudre un excommunié.

Arrêt du parlement de Paris en 1582, contre le Nonce du Pape, pour avoir excommunié les Cordeliers de Paris et ordre à l'archevêque de Paris de les absoudre *a cautete*.

Arrêt du 30 juin 1623, qui déclare l'excommunication prononcée par l'Evêque d'Angers contre son Grande Vicair abusive, et le condamne à la rétracter, plaçant son temporel sous saisie jusqu'à l'exécution de la sentence.

No. 10. Arrêt du 6 aout 1373, ordonnant que le temporel de l'Archevêque de Rouen serait mis en la main du Roi et exploité à son profit jusqu'à ce qu'il ait levé les excommunications.

Arrêt du 1 avril 1408, condamnant l'Evêque du Puy à faire cesser, à peine de saisie de son temporel, ou tenir en suspens durant le procès toutes les peines d'excommunication : et quant à ceux qui sont morts ainsi excommuniés et enterrés en terre profane, ils seront mis en terre sainte.

Arrêt du parlement de Paris du 15 mars 1409, par lequel l'Arche-

vêque de Rheims ayant fait excommunier Guillaume Matro par affiches, fut condamné à une amende pécuniaire et à le faire absoudre à ses dépens, à peine de saisie de son temporel.

Papon rapporte un arrêt du parlement de Toulouse du 22 mars 1457, qui condamne l'Official de Toulouse à révoquer plusieurs excommunications contre les officiers de la cour.

Arrêt du Parlement de Paris du 11 Juillet 1502, à la requête de Louis Pot, Evêque de Tournay, ordonnant que l'abbé de St. Amant sera contraint par emprisonnement de sa personne à faire casser, révoquer et annuler à ses dépens les monitions, censures et procédures faites en cour de Rome,—et qu'il sera procédé par prise de corps contre les porteurs, exécuteurs et sollicitateurs de telles monitions et censures de cour de Rome.

Arrêt du 7 septembre 1503, déclarant abusives certaines monitions et censures émanées de cour de Rome et condamnant l'impétrant à les faire casser à ses dépens.

Arrêt du grand conseil du 7 juillet 1523, (après les lettres patentes du roi François 1er) cassant la sentence de l'Archevêque de Bordeaux qui excommunait les religieux de l'ordre de St. François. En exécution de cet arrêt, l'Archevêque révoqua ses censures.

Arrêt du Parlement de Paris du 7 janvier 1537, déclarant que l'Evêque d'Amiens avait abusivement procédé *cessando à divinis* à cause des excommuniés.

Ajoutons dit le même auteur, que les incidents ou oppositions qui surviennent à l'exécution d'un Mandement ou fulmination, sont de la connaissance du juge séculier. Ainsi jugé par un arrêt du Parlement de Normandie du 16 janvier 1542.

Le 32 décembre 1626, François de Lorraine, évêque de Verdun, excommunique ceux qui entreprennent sur les batiments et droits de l'église. Sentence du Lieutenant du Roi du 1er janvier 1627, autorisant l'appel comme d'abus et ordonnant que les publications et affiches seront levées et ôtées. Excommunication publiée par l'évêque de Verdun contre Jean Gillet, lieutenant en la justice royale pour avoir fait afficher la sentence contre son Monitoire, le 2 janvier 1627. Jugement rendu le 13 février 1627, par le Parlement de Metz, par lequel les prétendus monitoires et excommunications de l'évêque de Verdun sont déclarés abusifs, scandaleux et remplis d'imposture et faux faits,—ordonné qu'ils seront lacérés et brûlés par l'exécuteur de la haute justice,—et pour réparation d'un tel attentat par le dit évêque de Verdun, il est dit qu'il sera mené sous bonne et sûre garde en la bastille, et les revenus de ses bénéfices mis sous la main du roi, le Sieur évêque condamné en cent mille livres d'amende et qu'il sera procédé contre ses complices par voie extraordinaire, comme perturbateurs du repos public.

Arrêt du Parlement de Toulouse du 24 mai 1677, déclarant abusive l'excommunication lancée par l'évêque de Cahors, contre la Dame Delon, parce qu'elle refusait de vivre avec son mari, qui la maltraitait,

Arrêt du Parlement de Provence, du 23 juin 1664, déclarant que le juge d'église commet abus en excommuniant un usurier condamné pour usure par le juge laïque.

Arrêt du 7 février 1668, déclarant abusive l'excommunication prononcée par l'évêque d'Amiens contre le doyen de l'église collégiale de Saint-Florent de Roye pour n'avoir pas voulu quitter l'étole devant lui lors de sa visite dans la dite église.

Arrêt du Parlement de Paris rendu à la demande faite le 23 janvier 1688, par l'avocat-général Talon, déclarant abusive la bulle d'Innocent XI du 12 mai 1687, sur laquelle avait été fondée l'interdiction de l'église de St. Louis et des ecclésiastiques qui la desservaient, pour avoir admis à l'église le marquis de Laverdin, ambassadeur du Roi de France, et lui avoir administré les sacrements.

No. 18. Arrêt du Parlement de Paris du 26 janvier 1373, déclarant que, lorsque par censure la juridiction temporelle est troublée, le Roi peut y pourvoir par ses officiers.

Arrêt de l'an 1399, contre l'Archevêque de Rouen et contre l'Archevêque de Tours qui avaient excommunié quelques officiers du Roi.

Arrêts des 16 et 26 février 1410, contre l'Archevêque et l'Archidiacre de Rheims, par lesquels il est dit qu'un Pair de France ou Officier ne pouvait être excommunié.

Arrêt du 17 avril 1707, déclarant qu'une monition générale n'atteignait pas les officiers du Roi ni les greffiers pour les choses qu'ils font comme officiers.

Arrêt du 1er Sept. 1427, déclarant que le Roi peut révoquer les entreprises des évêques contre les Officiers Royaux, par amende et saisie du temporel.

Arrêt du 22 décembre 1457, condamnant l'Archevêque de Toulouse à révoquer plusieurs excommunications contre les juge, avocat du Roi et Greffier de la Sénéchaussée et qu'il y serait contraint par la saisie de son temporel.

Arrêt du Parlement de Toulouse du 9 Sept. 1599, par lequel l'Evêque de Castres est condamné en deux mille écus, pour avoir excommunié deux conseillers de la Cour.

Arrêt du Parlement de Bordeaux du 30 Déc. 1606, condamnant le Cardinal de Sourdis, Archevêque de Bordeaux, à 15,000 livres d'amende, à prélever par la saisie et vente de ses biens temporels pour avoir excommunié les Officiers de la Cour et Officiers du Roi, et lui défendant de persister dans cette voie à peine d'encourir crime de Lèze-Majesté.

Arrêt de 1601, condamnant l'Archevêque d'Aix à révoquer l'excommunication qu'il avait prononcée contre les Présidents et les officiers de la Chambre criminelle d'Aix pour avoir condamné à mort et fait exécuter un homme trouvé coupable de sodomie.

In. No. 20.

Arrêt du 9 avril 1545, contre l'Archevêque de Bourges qui avait excommunié un abbé, pour refus de payer le droit de procuration prétendu par Archevêque. L'abbé fut relaxé *ad cautelam*.

Arrêt de janvier 1569, déclarant abusive l'excommunication prononcée par l'Official de Noyon, contre un prêtre qui était dans l'impossibilité de satisfaire ses créanciers—et sur un appel comme d'abus d'une excommunication de l'Evêque de Nevers, il fut jugé que les censures de *relevé* sont abusives.

Arrêt du 26 avril 1602, qui déclare abusive la suspension d'une prêtre à *divinis*, parcequ'il ne payait pas ce qu'il devait à un autre prêtre.

Arrêt conforme du Parlement de Bretagne du 5 septembre 1570.

Arrêt entre Jean Percevaux, chanoine de Léon, appelant comme d'abus, et Jean de la Truche, Doyen de Nantes, intimé. Celui-ci obtint à Rome contre l'appelant une sentence qui l'excommunait faute de payer les arrérages d'une pension constituée sur un bénéfice, défense à ses amis, jusqu'au nombre de quarante, de converser avec lui, sous peine d'excommunication, mandé au Roi et aux Princes *auctoritate apostolica ut per captionem personæ, ac bonorum distractionem in hunc insurgant*. Le Parlement de Bretagne, le 4 septembre 1559, déclare cette excommunication abusive et ordonne que, dans trois mois, l'intimé apportera absolution de Rome sur peine de saisie de son temporel et cependant l'appelant pourra prendre absolution *ad cautelam* de l'evêque de Nantes ou de son vicaire. L'intimé condamné aux dépens.

Arrêt du Parlement de Bretagne du 12 février 1554, qui déclare abusive la commission de l'Official de Rome portant contrainte de payer sous trois jours, à peine d'excommunication et de suspension à *divinis*.

Arrêt conforme du même Parlement rendue 3 Octobre 1555, contre les censures ecclésiastiques décrétées contre Ives Cuzial.

Arrêt conforme du Parlement de Rouen du 16 décembre 1547, contre l'excommunication d'un prêtre, faute de paiement d'une somme qu'il devait à un marchand.

Arrêt conforme du Parlement de Toulouse du 14 avril 1549. Autre arrêt du 2 Juin 1540, qui enjoint aux ecclésiastiques d'absoudre ceux qui sont excommuniés pour dette, à peine de saisie de leur temporel. Arrêt du Parlement de Toulouse du 5 Mai 1671, déclarant abusive l'excommunication lancée par le Métropolitain et le prêtre Navarre, pour dettes.

*Id.* No. 23. "Les rois et magistrats souverains, à qui ils communiquent leurs pouvoirs out autorité sur la police de l'église et ont souvent arrêté le cours des excommunications injustes."

It is contended that courts of justice, in the Province of Quebec, have a right to intervene in purely ecclesiastical matters, since (it is alleged) such a right existed under the French *régime* before the cession of the colony to the British Crown. In other words, it is contended that the whole body of the ecclesiastical law of France passed into the colony together with the body of law of the French kingdom, and still forms part of the laws of the Province of Quebec.



§ 1. *Ecclesiastical Law under the French Crown.*—The last, or at least one of the last documents relating to ecclesiastical matters under the French Crown (19th April, 1741), published by the King, and having reference to the Papal bull nominating Mgr. de Pontbriand to the Sec of Quebec, runs to the following effect:—

“Ayant fait voir en notre conseil les bulles et provisions apostoliques de l'évêché de Québec, octroyées à notre aimé et féal conseiller en nos conseils, le sieur Henri-Marie Du Briel de Pontbriand, et ne s'y étant trouvé aucune chose contraire ni dérogeante à nos droits, indult, concession et concordat d'entre le Saint-Siège et notre royaume, *ni aux privilèges, franchises et libertés de l'Eglise Gallicane*, nous avons admis le dit sieur évêque à nous prêter le serment de fidélité qu'il nous devoit à cause du dit évêché, ainsi qu'il paroît par le certificat ci-attaché sous le contrescel de notre chancellerie; à ces causes, nous l'avons mis et installé, mettons et installons par ces présentes signées de notre main, en la pleine, libre et paisible jouissance des biens, fruits et revenus du dit évêché.

“Si vous mandons, qu'en faute du dit serment non fait, ils étoient mis et saisis en notre main, vous ayez à lui en faire, comme nous faisons dès à présent, main-levée et délivrance, à la charge néanmoins de nous rendre les foi et hommage pour les terres qu'il tient, relevant de nous, et d'en donner des aveux et dénombrements dans le tems porté par nos ordonnances si fait n'a été; car tel est notre plaisir.”

The King exacts in this document the oath of allegiance due to him *à cause du dit Évêché*. But the order rendered in the *Chambre des comptes* on the 4th of May following, explains that this oath was taken “*pour raison et à cause de la temporalité du dit Évêque.*”

Mr. Gonzalve Doutre, the present President of the *Institut Canadien*, who has published this edict in his *Histoire Générale du Droit Canadien*, observes on page 213: “La preuve la plus incontestable qu'il soit possible de donner pour affirmer que les Evêques de la Nouvelle France se sont conformés à la Déclaration de 1682, est dans l'Edit de l'Installation de Mgr. de Pontbriand que nous avons déjà reproduit en entier. Cet Edit s'appuyant sur les *libertés Gallicanes*, il était nécessaire d'indiquer en quoi elles consistent.”

We cannot discover in this Edict the proof found in it by Mr. Doutre.

It is well known that at first the Archbishop of Rouen claimed jurisdiction over Monseigneur de Laval, ordained in 1658 bishop of Petrea *in partibus infidelium*, as holding under him and consequently under the Church of France. As early as the year following his induction (1659), a Royal *lettre de cachet*\* says: "Quelque lettre que j'aie accordée à l'archevêque de Rouen, mon intention n'est pas que lui ou ses grands vicaires s'en prévalent, jusqu'à ce que, par l'autorité de l'Eglise, il ait été déclaré si cet archevêque est en droit de prétendre que la Nouvelle France soit de son diocèse. Notre Saint Père le Pape n'en est pas persuadé, et ce serait un scandale si dans une Eglise naissante, la juridiction de celui que Dieu a établi chef de l'Eglise Universelle venait à être contestée.

Meanwhile the negotiations with the Holy See for creating Mgr. de Laval titular bishop of Quebec, advanced slowly. The cause of this delay is explained in a letter from the King to his ambassador at Rome, dated the 15th December, 1673: "Après avoir examiné le mémoire que vous m'avez envoyé sur les difficultés qui se sont trouvés dans l'expédition des Bulles d'érection de l'Evêché de Québec, j'ai jugé à propos de vous ordonner de ne plus insister sur la demande que vous aviez faite que *cet Evêché dépendît de l'Archevêché de Rouen, ou de quelqu' autre de mon Royaume.*" †

Upon this declaration, the Pope in 1674, founded the diocese of Quebec on the condition that it should hold directly from the Holy See, ‡ *qu'il dépendrait immédiatement de Rome.*

Mr. Doutre quotes Father Charlevoix to explain the words *dépendre immédiatement de Rome.* According to the historian of *La Nouvelle France*, they do not prevent the See of Quebec from being united in a certain way, *en quelque façon*, to the clergy of France, in the same way as the See of Puy, which was holding directly from Rome. The expression, *en quelque façon*, is extremely vague, and neither Charlevoix, nor Mr. Doutre himself informs us *in what way* either the See of Puy, or that of Quebec, was united to the Clergy of France, whether by the bonds

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\* Archives de l'Archevêché de Québec, Reg. A.

† See Charlevoix t. 1, p. 406.

‡ The Abbé Faillon, t. 3, p. 428; Charlevoix, t. 1, p. 406; The Abbé Ferland, t. 2, p. 102; Abbé Brassard, t. 1, p. 162; Garneau, t. 1, p. 174.

of charity and Christian love, or by the private relations which the Canadian clergy, incessantly recruited in France, kept up with the French clergy. As to the civil status of the Canadian clergy, the King's letter of the 15th December, 1673, which we have copied from Mr. Doutre, of itself constitutes a complete proof that such a legal union did not exist.

Mr. Doutre, page 181, adds that M. de Laval had been *named* by the King and *ordained* by the Pope, bishop of Quebec, agreeably to the concordat of 1615. Be it so. Does that prove the introduction into Canada of the liberties of the Gallican Church? The *concordat*, according to Mr. Doutre himself, "n'avait pas d'autre effet que d'attribuer au Pape l'institution pour les bénéfices électifs sur la présentation du Roi, qui s'était réservé la nomination à tous les bénéfices; c'est-à-dire, au roi la nomination, au pape l'institution."

The *concordat* could certainly not have reference to the *appel comme d'abus*, or to the liberties of the Gallican Church. The right of nomination, or rather of *presentation*, could be nothing more than a purely honorary one, inasmuch as it was always optional with the Holy See to confirm or annul the royal nomination. At any rate, we cannot conclude from the royal exercise of the right of nomination in the case of the bishop of Quebec, (supposing it to be a fact) that the King must have had a certain ecclesiastical jurisdiction over him, for his nomination was accompanied with the renunciation of the King's demand that he should hold from the Church of France, and was confirmed by the Pope on the condition that he should hold directly from Rome.

Mr. Doutre says again, p. 192: "Le Grand Vicaire de Bernières prétendait exercer la juridiction ecclésiastique sous forme d'officialité. Le Conseil, le 1er juillet 1675, lui enjoit de produire les titres en vertu desquels il prétend exercer cette officialité.

"Il a été tenu, au Canada, une officialité ainsi que cet arrêt le fait entrevoir. Ce fût un des premiers actes de Mgr. Laval que d'en établir une. M. de Lauzon-Charny fut nommé official et M. Forcapel, Promoteur. M. de Lauzon-Charny exerça publiquement et paisiblement les pouvoirs en Canada. En 1660 le Gouverneur de Montréal reconnut une sentence de l'official qui annulait un mariage."

The *arrêt* alluded to, far from showing the existence of an *officialité*—that is of an *officialité* possessing civil jurisdiction,

*juridiction contentieuse*, as in France—proves the very contrary; for the Grand Vicar is ordered to produce the titles by virtue whereof he pretends to exercise this officiality (*est enjoint de produire les titres en vertu desquels il prétend exercer cette officialité*). The officiality itself must have been as obscure as its titles, when an order for their production was thus rendered necessary in 1675.

The attempt made to prove that the Governor of Montreal recognized a judgment of the officiality annulling a marriage is hardly more conclusive; for in 1866 Judge Polette, at Three Rivers, in a cause of *Vaillancourt vs. Lafontaine*, recognized a *décret* of Mgr. Cook, likewise annulling a marriage.

That there was an officiality in *La Nouvelle France* just as one could be established to-day by any Catholic or Anglican Bishop, cannot be called in question; but it was a merely private ecclesiastical court and not the *officialité contentieuse of France*. We see on page 191 of Mr. Doutre's work that this Canadian officiality was not recognized and that the Superior Council in the case of the Abbé Morel (28th June, 1675) requested the Attorney-General to report upon this pretended ecclesiastical jurisdiction.

"Le 28 Juin, 1675, Messire Jean Dudouyt, se disant promoteur en la prétendue officialité de Québec, présente au Conseil une requête tendant à demander que M. Morel accusé devant le Conseil soit remis sous sa juridiction ecclésiastique. M. de Peiras, M. de Vitray, Conseillers, sont d'opinion qu'un grand nombre d'arrêts du Conseil n'ont pas reconnu cette officialité. Le Gouverneur veut que le Procureur-Général donne ses conclusions sur cette prétendue juridiction ecclésiastique. Le Conseil adopte cette dernière opinion.\*

Mr. Doutre does not inform us whether this report was ever made, nor what was the final decision in this leading case under the old régime, but on page 193 we read that Mr. Morel was liberated on bail.

It must be added that the minutes of the Superior Council's sitting of the 28th June, 1675, of which Mr. Doutre has published only the above *résumé*, are still more explicit. These were the precise terms of the judgment of the Council: †

\* Doutre, p. 191.

† We are indebted to Mr. Doutre's kindness for a copy of these minutes. The learned gentleman contributed them to the editorial department of the Review, as a sample of the *jugements motivés* of the Superior Council, and he will no doubt be pleased to find them pressed into service in the present discussion.

“ Le Conseil assemblé, auquel présidait Mgr. le Gouverneur, et où était D'amours, Dupont de Perras, de Vitray et le Procureur-Général en personne.

“ Vu la requête ce-jourd'hui présentée au Conseil par Messire Jean Dudouyt se disant promoteur en la *prétendue officialité de Québec* tendant à ce que Messire Thomas Morel, Prêtre détenu au Chateau St. Louis, soit rendu à son juge Ecclésiastique avec les informations et autres procédures faites par le Sieur Dupeiras, Conseiller, commissaire en cette partie, pour être, s'il y a cas privilégié par le juge Ecclésiastique et le dit Sieur Commissaire ou autre, procédé conjointement dans le tribunal ecclésiastique à l'instruction commencée. Et ainsi qu'il est plus au long porté par la requête, le réquisitoire du Procureur-Général par lequel il demande communication de la dite requête pour y donner ses conclusions aux premiers jours du Conseil.

“ OPINIONS.

“ M. de Perras, Rapporteur, pour le réquisitoire de M. le Procureur-Général : Que la requête lui soit communiquée pour donner ses conclusions sur les qualités prises par le dit Sieur Dudouyt ; que pour le surplus elle soit rejetée, y ayant été pourvu par plusieurs arrêts du Conseil et notamment par celui du dix de ce mois signifié au Sieur de Bernières.

“ M. Dupont : Que la dite requête soit communiquée au dit Procureur-Général ainsi qu'il l'a demandé pour sur ses conclusions être fait droit.

“ M. Damours : *idem*.

“ M. de Vitray : Que la requête soit rejetée et que dans l'arrêt, il soit fait mention des raisons pourquoi, *attendu qu'il y a été pourvu et que le conseil n'a point jusqu'à présent reconnu l'officialité.*”

“ Mgr. le Gouverneur : Que la requête soit rejetée, attendu que le Sieur Morel et le Sieur de Bernières ont été par arrêt déboutés du renvoi par eux prétendu, et que néanmoins, le Procureur-Général sera averti de la qualité de promoteur que le dit Sieur Dudouyt prend dans la dite requête qui sera paraphée *ne varietur* et demeurera au greffe, afin d'y avoir recours ; pour aviser que le dit Procureur Général à ce qu'il a à requérir sur la *dite prétendue officialité* pour les intérêts de Sa Majesté et des sujets tant ecclésiastiques que laïcs.

M. Duperra se range à cet avis.

M. de Vitray : *idem*.

*Arrêté*: Que la dite requête est rejetée, attendu que le Sieur Morel et le Sieur de Bernières ont été par arrêt du Conseil déboutés du renvoi par eux prétendu et que néanmoins le Procureur-General sera averti de la qualité de promoteur que le dit Sieur Dudouyt prend dans sa dite requête qui pour cet effet sera paraphée *ne varietur* et demeurera au greffe afin d'y avoir recours; pour aviser par le dit Procureur-Général à ce qu'il a à requérir sur la prétention de la dite officialité pour les intérêts de Sa Majesté et des sujets tant ecclésiastiques que laïcs." \*

After these testimonies it is not astonishing to find Marriot (Quebec Code of Laws, p. 148) remarking: "The less objections can arise to this restriction, because it is stated in the report of Governor Carleton and of the Chief Justice W. Hey that there was no ecclesiastical court in the colony. By which I must understand that there is no court of an Official."

Many other documents published by Mr. Doutre furnish convincing proof that neither the liberties of the Gallacan Church nor the *appel comme d'abus* were ever introduced into Canada. Among others the Edict of Creation of the Company of the Hundred Associates (1627) declares that the company is formed "afin d'essayer, avec l'assistance divine, d'amener les peuples qui y habitent à la connaissance du vrai Dieu, les faire policer et instruire à la foi et religion Catholique, Apostolique et Romaine." By their charter (1664) the *Compagnie d'Occident* bound themselves to convey into the colony a sufficient number of ecclesiastics "pour y prêcher le Saint Evangile et instruire ces peuples en la créance de la religion Catholique, Apostolique et Romaine."

On page 13 of Mr. Doutre's *Histoire Générale du Droit Canadien* appears the following declaration of the Canadian colonists:—

"Sachent tous qu'il appartiendra que l'an de grâce, 1621 le dix huitième jour d'août par la permission du Sieur lieutenant (noble homme Samuel de Champlain) capitaine ordinaire pour le Roi en la marine, lieutenant général ès dits pays et terres, se serait faite une assemblée générale de tous les français habitants de ce pays de la Nouvelle France, afin d'aviser des moyens les plus propres sur la ruine et désolation de tout ce pays et pour chercher les moyens de conserver la religion Catholique, Aposto-

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\* Jugements et délibérations du Conseil Supérieur Rég. A, t. 1, fol. 234.

*lique et Romaine*, l'autorité du Roi inviolable et l'obéissance due au dit seigneur vice-roi, après que, par les Sieurs lieutenant, religieux et habitants, présence du Sieur Baptiste Guers, commissaire du vice-roi, a été conclu et promis de ne vivre que pour la conservation de la dite religion, obéissance inviolable au roi et conservation de l'autorité du dit seigneur vice-roi.

In all these official papers, reference is only made to the Catholic Apostolic and Roman Church; not a word is said of the liberties of the Gallican Church.

The instructions given by the French Cabinet to Gaudais, under date the 7th May, 1663, four months before the creation of the Superior Council and some years before the erection of the diocese of Quebec, declare :

“ Pour ce qui est de la religion, monsieur l'évêque de Pétrée étant venu ici pour rendre compte au roi de ce qui se pourrait pratiquer, pour étendre la foi parmi les sauvages de ces contrées là, pour bien policer cette nouvelle église et pour cultiver les bonnes dispositions que les Français ont de se conformer entièrement aux maximes du christianisme, *il serait superflu que le dit sieur Gaudais s'appliquât à cette matière, parcequ'elle est particulièrement du fait du dit sieur évêque, auquel Sa Majesté a donné et donnera ci-après toutes les instructions dont il aura besoin pour la conduite de son troupeau et pour l'avancement de ses pieux desseins.*”

Finally, in a letter to the King's Minister of date the 13th November, 1681, after the creation of the Council and of the See of Quebec, the Intendant Duchesneau says: “ Vous verrez, Monseigneur, par la lettre que j'ai écrite aux propriétaires des terres en Justice et en Fief tant pour eux que pour leurs habitants, qu'après avoir conféré avec Monsieur l'Evêque, *comme vous m'ordonnez de le faire pour tout ce qui regarde le spirituel de ce pays.\**”

The Edict of creation of the *Compagnie d'Occident*, 1717, art. 53, binds them to maintain a certain number of ecclesiastics *pour y prêcher le Saint Evangile, faire le service divin et y administrer les sacrements, le tout sous l'autorité de l'évêque de Québec.*

According to Baron La Hontan, an authority quoted with so much respect in Mr. Joseph Doutre's argument, it would appear

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\* Doutre p. 209.

that the Catholic clergy was very far from being subject to the civil power. The following are his observations on the state of affairs in Canada between 1683 and 1692 :

“ Les gouvernements, politique, civil, ecclésiastique et militaire, ne sont, pour ainsi dire, qu’une même chose en Canada, puisque les procureurs généraux les plus rusés ont soumis leur autorité à celle des ecclésiastiques. Ceux qui n’ont pas voulu prendre ce parti s’en sont trouvés si mal qu’on les a rappelés heureusement. J’en pourrais citer plusieurs qui, pour n’avoir pas voulu adhérer aux sentiments de l’évêque et des Jésuites, etc., ont été destitués de leurs emplois, et traités ensuite à la Cour comme des étourdis et des brouillons.”

Do not all these documents establish in the clearest manner that the Gallican rights or the ecclesiastical laws of France in spiritual matters did not pass into the colony, undoubtedly for the reason that they were unsuitable to the circumstances in which it was placed? And here we may quote the judicious remarks of the late Chief Justice Sir L. H. LaFontaine, Bart., also cited by Mr. Doutre, p. 20: “S’il est encore vrai (vérité fondée sur la nécessité) que lorsque des habitants d’un pays civilisé le quittent, pour aller fonder une colonie dans un pays nouveau, inhabité, et par conséquent non soumis à aucun système de lois reconnues par les sociétés chrétiennes, ils sont censés emporter avec eux les lois de la mère patrie qui réglaient leur liberté, leurs droits de citoyens et leurs propriétés, il n’en est pas moins vrai que cette règle de droit public et politique ne peut comprendre que celles de ces lois qui peuvent tout naturellement convenir à la position nouvelle qu’ils se sont faite, eu égard aux circonstances et à leurs besoins, dans le pays où ils vont ainsi s’établir.”

What scandals would not the yet infant Church and Government of Canada have exhibited, if the civil authorities had possessed a right of intervention in religious matters? The following passage taken from Mr. Doutre (p. 191), suffices to give us an idea of the respect and harmony which existed between the Clergy and the Superior Council. “Le Conseil Supérieur dans sa séance du 15 juin 1675 se plaint que le Procureur-Général néglige le service du Roi et porte atteinte à l’autorité du Conseil, *en adoptant constamment, dans ses conclusions, les vues des Ecclésiastiques incriminés.*” Now, if the reader bear in mind the prosecution in the burial case of Mgr. St. Vallier, of the chapter and canons of the see of Quebec, the only one exist-



ing in the colony, he will see that those *incriminés* comprised neither more nor less than the whole clergy of Canada.

On the supposition that the canonical law of France, which permitted the civil courts to exercise jurisdiction over spiritual matters by means of the *appel comme d'abus* or otherwise, passed into New France as forming part of its common law; even in that case, it cannot be maintained that that law was sacred and could not be changed by the legislative authority. Now the King of France—the supreme legislative authority in *La Nouvelle France*—declared that the courts had jurisdiction in *civil and criminal matters, dans toutes les matières civiles et criminelles*, thereby excluding from their jurisdiction every question ecclesiastical and military.

In 1659, and before the creation of a regular judicature in the colony, the King issued an edict by which he enjoined the inhabitants to sue before the inferior courts already established by the company then governing the colony, and to carry their appeals to the governor in all *civil, criminal and police matters* not of sufficient importance to be brought before the Parliament of Paris.\*

In 1663, the Superior Council was established, and its jurisdiction, which did not undergo any change during the whole period of its existence, that is to say, till the cession to Great Britain,—is thus defined by the Edict creating it:

“Avons au dit Conseil Souverain, donné et attribué, donnons et attribuons le pouvoir de connaitre de toutes *causes civiles et criminelles*, pour y juger souverainement et en dernier ressort, selon les Loix et Ordonnances de notre royaume, et procéder *autant qu'il se pourra* en la forme et manière qui se pratique et se garde dans le ressort de *Notre Cour du Parlement de Paris*.”

The commission to the Intendant Duchesneau (1675) contains the following: “Le Conseil Souverain, auquel vous présiderez, ainsi que dit est, juge *toutes matières civiles et criminelles*, conformément aux Edits et Ordonnances du Roi et à la coutume de Paris.”

Let us next see whether the jurisprudence of the country was agreeable to these ordinances.

The answer of the King's Minister to Frontenac for having caused the Abbé Fénélon to be prosecuted before the Superior

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\* Garneau, vol. 1, 139; Doutre, p. 44.

Council on account of a sermon which the Governor considered abusive, runs thus: "Il fallait remettre l'abbé Fénélon entre les mains de son Evêque ou du Grand Vicaire *pour le punir par les peines ecclésiastiques.*"

The ordinances of Dupuy and of the Superior Council rendered against the chapter and canons of Quebec, who had refused to recognize any tribunal, not even the Superior Council, as capable of judging their ecclesiastical disputes, are invoked as proving the right of the civil power to intervene in ecclesiastical matters by the *appel comme d'abus*. In his ordinance of the 6th January, 1728 (Edits et Ord. vol. 2, p. 327) he says: "Vu le peu de temps qu'il y a d'assembler extraordinairement le Conseil Supérieur et le voir prononcer contre une publication aussi téméraire, faite uniquement dans le dessein d'exciter les peuples; nous croirions que ce serait manquer à notre devoir que de ne pas prendre assez tôt sur cela de justes mesures pour mettre le dit Conseil en état de punir et de sévir contre les auteurs d'une pareille entreprise, laquelle ne tend qu'à séduire le peuple à la faveur de sa simplicité et de la connaissance qui lui manque pour distinguer la puissance ecclésiastique d'avec la puissance séculière; le peuple ne pouvant pas savoir avec assez de précision que la puissance propre aux ecclésiastiques n'est que sur le spirituel et sur les choses qui concernent le salut des âmes, les ordres à conférer aux ministres de l'Eglise, l'administration des sacrements et ce qui s'en suit des effets du sacrement de mariage et des autres sacrements; que tous les autres droits et prérogatives des ecclésiastiques et séculiers entre eux sont matières *purement temporelles*, dévolues à la puissance du roi et partant à la connaissance des juges qui sont chargés de sa justice sur tous ses sujets sans distinction dont les ecclésiastiques (pour l'exemple qu'ils doivent au peuple) doivent se montrer les plus soumis.

"L'Eglise étant dans l'Etat et non l'Etat dans l'Eglise, faisant partie de l'Etat sans lequel elle ne peut subsister, les ecclésiastiques étant d'ailleurs si peu les maîtres de se soustraire un seul moment à la justice du prince que sa Majesté enjoint à ses juges, par les ordonnances du royaume de les y contraindre par la saisie de leurs revenus temporels, n'étant nécessaire, pour en convaincre tout le peuple de cette colonie inviolablement attaché au culte dû à Dieu et à l'obéissance due au roi par l'express commandement de Dieu, que de lui donner connaissance, ainsi que nous allons le faire, de la déclaration publique que les Evêques de France, assemblés à

la tête du clergé, ont donné le 19 mars de l'année 1682; laquelle déclaration porte en propres termes, que Saint Pierre et ses Successeurs, vicaires de Jésus-Christ, et que toute l'Eglise même, n'ont regu de puissance de Dieu *que sur les choses spirituelles* et qui concernent le salut, et non point sur les choses temporelles et civiles: Jésus-Christ nous apprenant lui-même que son royaume n'est pas de ce monde, et, en un autre endroit, qu'il faut rendre à César ce qui est à César, et qu'il s'en faut tenir à ce précepte de l'apôtre Saint Paul, que toutes personnes soient soumises aux puissances des rois, car il n'y a point de puissance qui ne vienne de Dieu, c'est pourquoi celui qui s'oppose à la puissance des souverains résiste à l'ordre de Dieu; en conséquence, poursuit la dite déclaration du clergé, nous déclarons que les rois ne sont soumis à aucunes puissances ecclésiastiques par l'ordre de Dieu dans les choses qui concernent le temporel.

"Ce sont ces vérités reconnues et annoncées par un clergé aussi auguste que l'est le clergé de France dont les prélats et ecclésiastiques qui le composent, ont toute la science et la capacité convenable pour ne point se tromper eux-mêmes et ne point induire les peuples en erreur, aussi bien dans les affaires du gouvernement de l'État que dans les plus grandes vérités de la religion; ce sont, disons-nous, ces principes qu'il convenait d'apprendre ici au peuple, plutôt que d'abuser de cette chaire de vérité où l'on ne doit prêcher que l'obéissance due à Dieu et au roi, pour faire de la part des dits chanoines et chapitre un acte de désobéissance formel à la puissance du roi et à l'autorité légitime; c'est donc pour aller au-devant de ce désordre et mettre le conseil supérieur en état de punir les coupables que nous ordonnons qu'il sera informé contre le Sieur de Tonnancourt, chanoine de la Cathédrale et autres, de la publication du prétendu mandement et manifeste par devant le Sieur André de Leigne, Lieutenant-Général, civil et criminel....."

The intendant Dupuy in this document does not appear to assert the supremacy of the civil power in matters purely ecclesiastical or spiritual as laid down in the 4th article of the Declaration of 1682, and in numerous text-books and decisions of the French courts of justice. If the "*puissance propre aux ecclésiastiques*" extended only to spiritual matters, the *puissance propre* of the State could have had nothing to do with those matters.

Moreover, as His Honor Mr. Justice Berthelot observed in his able opinion in the *Guibord* case, the ordinances of the Intendant

and the *arrêts* of the Superior Council rendered thereupon were disallowed by Governor de Beauharnois.\*

"Ces deux ordonnances," says Mr. Justice Berthelot, "paraissent si étranges et si peu justifiables au Gouverneur français M. de Beauharnois, que ce dernier rendit une ordonnance du 8 Mars 1728, au nom du Roi, dont je reproduis l'extrait suivant. Il y est dit :

'Le Conseil ne pouvait ignorer les *ordres de sa Majesté* qui y ont été *enregistrés*, par lesquels il lui est *défendu* de faire aucuns réglemens généraux qu'en présence du Gouverneur-Général et de l'Intendant. Nous avons lieu de nous flatter que dans des matières aussi importantes et aussi extraordinaires que le sont celles dont il est question, il n'aurait pas pris des résolutions aussi vives que celles qu'il a prises sans nous avoir demandé auparavant notre avis.

'Nous espérons aussi que cette compagnie, informée des mauvais effets que ses arrêts multipliés faisaient dans tous les esprits, se porterait à cesser toutes ses poursuites et à attendre la décision de Sa Majesté sur des matières aussi douteuses et aussi contestées.

'Nous défendons de la part du Roi aux officiers du Conseil Supérieur de Québec, de recevoir dès à présent aucune requête ou réquisition, ni aucune réponse de la part des parties citées, et de rendre directement ou indirectement aucuns arrêts sur les matières en question ; et suspendons l'exécution de toutes ordonnances jusqu'à ce qu'il ait plu à Sa Majesté d'en ordonner.

'Voulons que notre présent ordre soit porté au Conseil Supérieur au premier jour d'assemblée pour y être lu, puis publié et affiché en tout lieu où besoin sera.'

"Peu de temps après ce désaveu par le Gouverneur, des ordonnances de l'Intendant Dupuy et du Conseil Supérieur sur cette matière, il y eut un ordre du Roi enregistré au dit Conseil Supérieur, le 27 Septembre, 1728, et il s'y trouve en ces termes aux Régistres pour l'enregistrement des arrêts du Conseil Supérieur de Québec, 1728, folio 43.†

"Vendredi, le 17 septembre 1728.

"Le Conseil extraordinairement assemblé, où étaient M. le Gouverneur-Général, MM. Deleno, Macart, Sarrazin, Lothinière,

\* Garneau, vol. 1, p. 213-15. L'Abbé Faillon, Hist. de la Col. Fr. vol. 3, p. 495-538.

† The King's order is not published in the official collection *des Edits et Ordonnances*.

Hazeur, St. Simon, Guillermin, Crespin et Lanouillier, Conseillers, ce dernier faisant les fonctions de Procureur-Général du Roi.

“Vu au Conseil l'extrait de la lettre de Monsieur le Comte de Maurepas, Ministre et Secrétaire d'Etat, adressé à Monsieur le Marquis de Beauharnois, Gouverneur et Lieutenant-Général pour le Roi en toute la Nouvelle France, datée à Versailles le 1er juin dernier, qui notifie au Conseil Supérieur de Québec que l'intention de Sa Majesté est qu'il ait à donner main levée des saisies et amendes ci-devant prononcées par les arrêts du dit Conseil, en date des 5, 12 et 26 janvier, 3 et 16 février, 1er et 8 mars derniers, tant contre les Dignitaires, Chanoine et Chapitre de l'Eglise Cathédrale de Québec, que contre le Sieur Boullard, Vicaire-Général et Curé de la paroisse et les Pères Récollets de la ville; ouï le Procureur-Général du Roi, le Conseil, pour donner à Sa Majesté des preuves de sa profonde soumission, fait dès à présent main levée des dites saisies prononcées par les dits arrêts; décharge des dites amendes, ordonne la restitution d'icelles, si aucunes en tout ou partie ont été exigées; déclare ceux entre les mains de qui les dites saisies auront été faites, bien et valablement déchargées, en payant aux parties saisies ce qui leur est dû sur l'expédition du présent arrêt.

“(Signé)

DE LINA.

“Certifié vrai.

“PERRAULT ET BURROUGHS,

“P. B. R. ”

One word more, and we conclude our notice of the ecclesiastical law of Canada on purely spiritual matters of the Catholic Church prior to the cession. We read in Guyot, *Vo. Colonie*: “L'intendant et le Gouverneur connaissent seuls de tout ce qui concerne les affaires de religion et la police de culte, parceque l'intention du roi est que les ecclésiastiques ne soient pas repris avec éclat dans les colonies et que s'ils y commettent des fautes graves, ils soient renvoyés en France pour y être punis.”

These terms clearly show that there existed in the French colonies no ecclesiastical tribunal properly so called, and that the Superior Councils or Parliaments had no jurisdiction in religious matters, as they had in France. They prove that the civil tribunals of Canada were not invested with the powers exercised by the courts of justice in the mother country. Not only so, but we see that even in case of *fautes graves*—an expression which

in the language of French criminal law would include criminal offences,—in order to avoid scandal, the accused ecclesiastic was not to be judged in the colony, but was to be sent to France as soon as possible.

Few Canadian jurists have expressed an opinion on the ecclesiastical law of New France in spiritual matters.

Mr. Justice Beaudry in his *Code des Curés*, seems to be of opinion that the liberties of the Gallican Church were never introduced into Canada; for he says (pp. 2, 3): “La déclaration du clergé de 1682, ne paraît pas avoir été enregistrée, ni mise en force en Canada.”

Mr. Justice Berthelot, in *re Guibord*, expressed himself to the following effect, with reference to the terms of the Edict of creation of the Superior Council.

“Il est évident que ces termes sont restrictifs, et il est impossible d’y voir aucune attribution judiciaire donnée au Conseil Supérieur en matières ecclésiastiques et spirituelles, ou sur les appels comme d’abus qui étaient spécialement réservés par les articles 81 et 82 des libertés gallicanes, telles que rapportées par Pithou au vol. 3 de Durand de Maillane, “pour n’être adjugées que par la Grande Chambre du Parlement qui était le lit et siège de justice du Royaume, composée de nombre égal de personnes, tant ecclésiastiques que non ecclésiastiques, même pour les personnes des Pairs de la Couronne, qui est un fort sage tempéramment pour servir comme de lien et entretien commun des deux Puissances. . . . .

“L’on ne doit donc pas affirmer que le droit gallican ou le droit ecclésiastique français tel qu’il existait en France avant mil sept cent cinquante neuf, était reconnu comme le droit ecclésiastique de la colonie de la Nouvelle France, puisque le Conseil Supérieur ne paraissait pas jouir et n’avait pas le droit de jouir de la juridiction ecclésiastique en matière religieuse et spirituelle.”

In appeal, Mr. Justice Monk expressed himself as follows: “There can be no doubt, so far as my knowledge extends, that the civil power in this country has never directly controlled the spiritual action and decrees of the Church in Canada.”

Mr. Justice Drummond did not hesitate to assert that under the French dominion, the *appel comme d’abus* existed in Canada; but the learned Judge did not support his statement by any authorities.

The same remark may be made concerning Mr. Justice Badgley, who, he it said *en passant*, so far forgot his position as inter-

preter of the laws of our country as to seize this opportunity to inveigh with unwarrantable violence against what he calls the intolerance of the Church of Rome. Circumspection, caution, and calmness were especially to be looked for from him, seeing that he was the only Protestant Judge on the Bench, and that the matter under consideration was a dispute within the fold of the Catholic Church. In an age like ours, in which the principles of religion and public morality are so evidently on the decline, the Honorable Judge should have followed the example of his learned colleagues and *coréligionnaires* of the other Court, and have refrained from assailing the doctrines of a Church whose members constitute the immense majority throughout the Province.

But to return. Mr. Justice Badgley said: "It is not necessary, as the case presents itself, and simply for that reason, to examine the jurisdiction and powers of the Civil Courts in this Province in matters of *abus* before the cession of 1763."

However, he adds farther on: "I presume it would be no difficult thing to ascertain and fix the jurisdiction of our Courts in matters of ecclesiastical *abus*, the more so as the Court of King's Bench has more than once declared to have inherited all the jurisdictional powers of the highest jurisdictions and Courts in Canada previous to the conquest. The necessity for such an examination does not present itself in this cause, but it would not be difficult to fix the extent of jurisdiction of the courts in such matters, if the occasion required it."

It is to be regretted that the Honorable Judge did not condescend to enlighten the public mind upon the jurisdiction of the courts in the French colony in matters of ecclesiastical abuse, especially as he professed to find the task so easy.

Mr. Justice Mondelet, who rendered the first judgment *in re Guibord*, is the only judge who cited any authority to support the doctrine that the whole body of the ecclesiastical law of France was introduced into the colony: "Rien de mieux établi. Nous n'avons pas à décider si, invariablement, les parlements en France qui étaient, sous le régime de ce pays, ce que sont nos cours, nos tribunaux, nous n'avons pas, dis-je, à décider si, invariablement, ils se sont tenus dans les limites de la loi et de leurs attributions. Je pourrais, sans hésiter, avancer qu'en plusieurs occasions, ils ont commis des abus de pouvoir révoltants. Et cela, c'est comme qui dirait avec vérité, que parfois nos tribunaux

rendent des jugements qu'on ne peut faire corriger que par les cours d'appel. Mais ces observations ne détruisent pas le fait de l'existence d'un droit commun quelconque. Or, dans le cas de la France, il était de droit commun, que les tribunaux étaient en droit de s'occuper des appels comme d'abus, des actes du pouvoir religieux. Les autorités fourmillent et les arrêts sont par centaines qui l'établissent. Cela est si bien établi, c'est si peu douteux, que la défense n'a pu le nier, l'a admis même, et a eu à se retrancher derrière les articles de la capitulation, pour se débarrasser de ce droit commun qui a existé durant des siècles en France, et qui, *va sans dire, était le droit commun du Canada, lors de la cession du pays à l'Angleterre. Ce serait une perte de temps, que d'insister sur une vérité qui n'est pas même contestée.*"

We do not wish to deny that loss of time and especially of the time of a judge, is a great loss ; the reasoning, however, *cela va sans dire*, is scarcely convincing. But patience ; the authorities immediately follow. "Mais," continues the learned Judge, "ce qui rend la chose plus sensible, c'est que tout récemment, nous avons eu la déclaration formelle de Mgr. Désautels, dans son 'Manuel des Curés,' publié en 1864, quant à ce qu'est le droit commun ecclésiastique en Canada. Et comme Sa Grandeur l'Evêque de Montréal a approuvé et recommandé par écrit, (au commencement de l'ouvrage,) ce manuel, l'on peut sans difficulté, affirmer que ce qui suit est l'opinion de l'Evêque de Montréal :

'Nous ne saurions douter que le Droit Commun Ecclésiastique qui était celui de la France, avant la cession du Canada à l'Angleterre, est le Droit Ecclésiastique particulier au Canada. En effet, l'arrêt du Conseil d'Etat du Roi, pour la création du Conseil Supérieur de Québec (1663) donne au dit Conseil le pouvoir de juger souverainement et en dernier ressort, selon les lois et coutûmes du Royaume de France'—Nous ne devons regarder comme obligatoires en Canada, que ce qui était reconnu être, jusqu'à 1663, le droit commun ecclésiastique de France—Nous ne devons pas nous arrêter à tous les arrêts de Règlement, mais seulement prendre pour règle, disons-nous, ce qui était le droit commun de France, avant 1663.' Je ne m'étonne pas qu'en 1864, Monsgr. Désautels, et Sa Grandeur Monsgr. de Montréal, fussent de cet avis, mais ce qui doit nous surprendre, c'est qu'en 1870, l'on mette en doute, ce qui n'en est pas susceptible ; je me trompe, qu'on nie avec autant d'assurance qu'on le fait, ce que l'Evêque, de Montréal a expressément déclaré, par Mgr. Désautels, être le droit commun ecclésiastique du Bas Canada !"



It is plain that, in ecclesiastical law, the Honorable Judge entertains a higher respect for his Bishop than for the Pope. He concluded his argument as follows: " Il ne me reste plus qu'à exprimer mon étonnement, qu'un des savants conseils des défenseurs aient poussé ses prétentions jusqu'à citer à la Cour le *Syllabus* et à s'en étayer pour réduire en proposition, que 'la compétence de ce tribunal, dans l'espèce actuelle, est condamnée par l'Eglise'; il suffit de signaler une telle prétention pour en apprécier la valeur."

Finally, the Honorable Judge invoked the authority of Sir L. H. LaFontaine: " Dans la cause de Varrennes, Jarret et Sénécal, en appel, en Mars 1860—Le juge en chef Sir Louis H. LaFontaine en parlant du *factum* du savant conseil de l'appelant, M. Cherrier, s'exprime comme suit: (L. C. Jurist, vol. 4, p. 213, et surtout p. 233.)

' Je les approuve les raisonnements, d'autant plus que je vois avec plaisir, qu'il a puisé tous les principes qu'il a énoncés et soutenus, exclusivement dans l'ancien droit ecclésiastique de la France, *qui est celui du Bas-Canada*, et par conséquent, celui d'après lequel, *nous avons fait serment de juger.*' "

We do not see that either the learned and much regretted Chief Justice or Mgr. Desautels held or declared that the *appel comme d'abus* ever existed in Canada, or that the civil courts had the right to intervene in spiritual matters. Doubtless the ecclesiastical law of the country is the same as the one in force in Canada at the cession, so far as consistent with the political transformation of the colony under British rule, as we shall see in our next number, but that ecclesiastical law had reference only to temporal matters, and not to things purely spiritual, which were beyond the reach of the laws and courts of the land.

In the case of *Sénécal* above referred to, the question was not a spiritual but a purely temporal one, and as such was necessarily decided by the old law of France. It was: Who had the right to preside at meetings of *fabriques*,—the curé or the oldest churchwarden?

Furthermore, in a written opinion to the Seminary of Montreal in 1847, cited by Mr. Justice Berthelot, Sir L. H. LaFontaine, expressed himself thus: " L'examen de ces deux questions conduit nécessairement à celui de plusieurs autres questions incidentes. Les unes et les autres présentent toutes les difficultés qui se rattachent ordinairement aux questions de droit ecclésiastique, diffi-

cultés qui sont d'autant plus grandes pour l'avocat canadien, que pour des raisons qu'il est inutile d'expliquer, mais que justifie pleinement *la situation particulière du pays, au point de vue religieux*, il est pour ainsi dire, *sans boussole et sans voie tracée*, lorsqu'il est obligé de se mettre à la recherche des principes ou des règles de *l'ancien droit ecclésiastique français qui peuvent recevoir leur application dans le Bas Canada.*"

After reading this opinion, it is impossible to cite Sir L. H. LaFontaine as holding that the whole body of French ecclesiastical law was introduced into Canada.

The learned Judge is equally unfortunate in his quotation from Mgr. Desautels, whose *Manuel des Curés* treats only of the temporal government of parishes and *fabriques*. Nowhere in that book can there be found an admission that the French ecclesiastical law in spiritual matters was ever in force in Canada. And upon reading the circular of the Bishop of Montreal approving thereof, will be found the following proposition, which is far from admitting the liberties of the Gallican Church and the ecclesiastical law of France as it existed in France at the time of the cession to the British Crown, or of the establishment of the Superior Council of Quebec, 1663:

"10. *La puissance spirituelle doit être, pour le bien de la société chrétienne, distincte et indépendante de la puissance civile, quoiqu'en puissent dire les ennemis de la puissance spirituelle.*"

Finally, Mr. Justice Mondelet's argument contains statements which can hardly be reconciled with each other.

At page 6 he says: "Dans la cause même du curé Naud contre l'Evêque Lartigne qu'a citée la défense, la cour a statué au fond, bien que très correctement elle se soit déclarée incompétente quant aux raisons qui avaient induit l'Evêque à suspendre M. Naud de ses fonctions sacerdotales. Cela, en effet, regardait l'Evêque et le curé seuls, et la Cour n'avait rien à y voir. L'Evêque est et doit être seul juge de l'opportunité de changer de curé, ou missionnaire dans l'intérêt même des cures; et souvent pour de graves causes et raisons, il importe qu'on ne connaisse pas les circonstances qui ont amené ce déplacement."

At page 7 he says: "Il est bon de faire, de suite, justice d'une objection un peu spécieuse, mais qui ne peut soutenir un examen sérieux. Allez-vous, a-t-on dit, obliger un prêtre de faire des prières au cimetière, et prêter son ministère contre ses convictions? Cela est purement spirituel, les tribunaux n'ont rien à y voir.

Mais remarquez donc que les tribunaux, non seulement en France, et c'était le droit commun ecclésiastique et la jurisprudence constatée par des arrêts sans nombre, mais en Canada, les cours ont été bien plus loin que d'ordonner ce dont il est question ici, la simple sépulture ecclésiastique, laquelle n'est pas un sacrement, mais simplement une cérémonie, les tribunaux ont contraint le prêtre d'administrer le sacrement de baptême. *Or ce sacrement est bien une chose spirituelle, religieuse.*

What! a Bishop is not amenable to a civil court, to show cause why he has removed a *curé* and yet he is subject to be judicially compelled to administer the sacraments! The *appel comme d'abus* exists in the latter case but not in the former!! Surely a state of affairs so illogical never could have existed in France.

A word now as to the status of Protestant Churches in Canada before the cession, and we conclude for the present number. It is well known that in France the Catholic Church was the only State Church. At the time when the Colony of New France was organized in 1608, while the Edict of Nantes (1598) was still in full force, it was the only recognized Church in the colony, but not to the exclusion of Protestant Churches, which were tolerated under the regulations prescribed by that Edict. In 1621 we find the inhabitants of Canada complaining of this in a Petition to the King, wherein they pray for the establishment of Catholicism and the exclusion of the Huguenots. In 1627 when the Company of The Hundred Associates was incorporated, one of the conditions of their charter was that the country should be colonized with *naturels français catholiques*. (Art. 2 of the Edict.)

According to Art. 23 of the Charter of the *Compagnie de l'Occident*, in 1717, only the resident foreigners of Canada who were professing the Catholic, Apostolic and Roman faith were allowed to exercise the rights of French subjects (*régnicoles*). A Protestant foreigner, therefore, could not inherit, receive property by gift or legacy, or in any beneficiary way, without naturalization.

The revocation of the Edict of Nantes, 1685, not having been registered by the Superior Council, was never law in this country. However, in an ordinance of the Intendant Dushesneau in 1676, but which cannot be regarded as constitutional inasmuch as it clashes with the Edict of Nantes, we find the following severe

restrictions : "Défenses aux personnes de la religion prétendue réformée de s'assembler pour faire l'exercice de leur religion dans l'étendue de ce dit pays, sous peine de châtimement suivant la rigueur des ordonnances, lesquelles ne pourront hiverner à l'avenir en ce dit pays, sans permission, et que si quelqu'un y hivernoit pour cause légitime, ils n'auront aucun exercice de leur religion, et vivront comme des Catholiques sans scandale."

That under the sway of these laws, the exercise of the Protestant worship was greatly, if not totally, restricted is unquestionable; but it seems that none of them went so far as to deprive Protestant French subjects of their civil rights. In this respect, the Edict of Nantes, which tolerated the "*so called reformed Church*," was the political law or charter of Protestant Churches in *La Nouvelle France*.

D. GIROUARD.

Montreal, 7th October, 1871.

(*To be continued.*)

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#### THE ELECTION LAWS.

The coming year of 1872 will be one of much importance to the Dominion. The first Parliament will have closed its career, and the people will be called upon to choose those to whom they desire the public affairs shall be entrusted. The machinery of Government applicable to a large confederation having been devised and set up by the Parliament which will have passed away, the approval or condemnation of its acts must be submitted to those from whom, under our English constitution, the power emanates. No uniformity in the mode of selecting the Representatives to the House of Commons having been agreed upon by Parliament, the selection will be left to each Province, to be made according to its own laws. By an act passed at the last session of the Dominion Parliament, 34 Vic. c. 20, entitled "The Interim Parliamentary Elections Act, 1871," and to be in force for two years only from the time of its passing, section 2, it is declared : "The laws in force in the several Provinces of "Canada, Nova Scotia, and New Brunswick, at the time of the "Union on the 1st of July, 1867, relative to the following matters—that is to say—the qualifications and disqualifications of

" persons to be elected or to sit or vote as Members of the Legislative Assembly, or House of Assembly, in the said several Provinces respectively—the voters at elections of such Members—the oath to be taken by voters—the powers and duties of Returning Officers—and generally the proceedings at and incident to such elections, shall be provided by the British North America Act, 1867, continue to apply respectively to elections of Members to serve in the House of Commons for the Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick." There are certain exceptions, as to the polling in Ontario and Quebec lasting only for one day, and that the qualification of voters in Ontario shall be such as was by law in force on the 23rd of January, 1869; and a provision that the Revisors in Nova Scotia shall add to the list of voters the names of such Dominion officials and employees as would have been qualified to vote under the laws in force in that Province on the 1st of July, 1867, but who may have been disqualified by act of the Legislature of that Province passed since that day. There are also provisions respecting Quebec, British Columbia and Manitoba, and on some other points, but not of a bearing necessary to be observed upon in this article.

Without commenting upon the propriety or impropriety of having the same House composed of Representatives chosen under different laws, with different statutory qualifications, and elected in different ways, it is sufficient to say that Parliament in its wisdom thought proper to prefer such a course, leaving to the House hereafter to be chosen to determine whether the continuance of such a course shall be prudent for the future or not. The important questions of the qualifications of the candidates, of the nature and extent of the franchise, and of the mode of election, whether by ballot and simultaneous polling or not, will no doubt form during the discussions preceding, and the canvas pending the elections, the subject of many and exciting arguments.

Assuming that all are desirous of doing what is best for the country, it may be useful to compare the existing laws, and thus by contrast enable the people of all the Provinces to select from the legislation of each that which may be deemed best, not simply in theory but in practical working. For this purpose it is proposed briefly to point out the salient features of the election laws in the three Provinces of Ontario, New Brunswick, and Nova Scotia—Quebec is not touched upon,—and with reference to both

British Columbia and Manitoba, it is manifest a little time must be allowed to those two Provinces to develop their own systems.

In the three Provinces referred to, the Election Laws differ very materially, both as to the qualification of the Electors and the Candidates, the mode and time of voting, and the restrictions imposed upon the exercise of the franchise.

First:—As to the qualification of the Voters.

In *Ontario*, every male person 21 years of age, a British subject by birth or naturalization, not coming under any legal disqualification, duly entered on the last revised and certified List of Voters, being actually and *bona fide* the owner, tenant, or occupant of real property of the value hereinafter mentioned, and being entered in the last revised assessment roll for any city, town, or village, as such owner, tenant, or occupant of such real property, namely:—

In Cities, of the actual value of .....	\$400
In Towns     "     "     "     .....	300
In Incorporated Villages, of the actual value of	200
In Townships,                     "     "     "     .....	200

shall be entitled to vote at Elections for Members for the Legislative Assembly.

Joint owners or occupiers of real property rated at an amount sufficient, if equally divided between them, to give a qualification to each, shall each be deemed rated within the Act; otherwise, none of them shall be deemed so rated.

"Owner" means in his own right, or in right of his wife, of an estate for life or any greater estate.

"Occupant," *bona fide* in possession, either in his own right or in right of his wife (otherwise than as owner or tenant) and enjoying revenues and profits therefrom to his own use.

"Tenant" shall include persons who, instead of paying rent in money, pay in kind "any portion of the produce of such property."

In *Nova Scotia* every male subject by birth or naturalization, 21 years of age, not disqualified by law, assessed on the last revised assessment-roll, in respect of real estate to the value of \$150, or in respect of personal estate, or of real and personal together, of the value of \$300, shall be entitled to vote.

Also, when a firm is assessed in respect of property sufficient to give each member a qualification, the names of the several persons comprising such firm shall be inserted in the List, but no

member of a corporate body shall be entitled to vote or be entered on the List in respect of corporate property.

Also, when real property has been assessed as the estate of any person deceased, or as the estate of a firm, or as the estate of any person and son or sons, the heirs of the deceased in actual occupation at the time of the assessment, the persons who were partners of the firm at the time of the assessment, and the sons in actual occupation at the time of the assessment shall be entitled to vote, as if their names had been specifically mentioned in the assessment, on taking an oath, if required, in accordance with the facts coming within the separate classification of the above provisions.

In *New Brunswick* every male person 21 years of age, a British subject not under any legal incapacity, assessed for the year for which the Registry is made up:—In respect of real estate to \$100, or personal property, or personal and real, amounting to \$400, or on an annual income of \$400, shall be entitled to vote.

Thus, in both Nova Scotia and New Brunswick the franchise is more extended than in Ontario. In Ontario it still savours of the real estate. In New Brunswick and Nova Scotia it is based upon personal estate, *per se*, as well as real estate.

In *Ontario* certain persons are forbidden to exercise the franchise whether qualified or not, namely:—Judges of the Supreme Courts, of County Courts, Recorders of cities, officers of the Customs of the Dominion, Clerks of the Peace, County Attorneys, Registrars, Sheriffs, Deputy Sheriffs, Deputy Clerks of the Crown, Agents for the sale of Crown lands, Postmasters in cities and towns, and Excise Officers, under a penalty of \$2000, and their votes being declared void.

Again, no Returning Officer, Deputy-Returning Officer, Election clerk, or Poll clerk, *and* no person who at any time, either during the election, or before the election, is, or has been employed in the said election, or in reference thereto, or for the purpose of forwarding the same, by any candidate, or by any person whomsoever, as counsel, agent, attorney, or clerk at any polling place at any such election, or in any other capacity, whatever, and who has received, or expects to receive, either before, during, or after the said election, from any candidate, or from any person whomsoever, for acting in any such capacity as aforesaid, any sum of money, fee, office, place, or employment, or any promise, pledge or security whatever, therefor, shall be entitled to vote at any election.

No woman shall be entitled to vote at any election.

In *New Brunswick* and *Nova Scotia* there is no restriction as to the exercise of the franchise by persons who are duly qualified. On the contrary, express provisions are made to enable presiding officers, poll clerks, candidates and their agents, when acting in the discharge of their various duties connected with the election, to poll their votes in districts where, otherwise but for such provisions, they would not be entitled to vote.

*As to the Qualification of Candidates.*

In *Nova Scotia* the candidate must possess the qualification requisite for an elector, or shall have a legal or an equitable freehold estate in possession, of the clear yearly value of eight dollars.

In *New Brunswick* the candidate must be a male British subject, 21 years of age, and for six months previous to the test of the writ of election have been legally seized as of freehold for his own use of land in the Province of the value of £300, over and above all incumbrances charged thereon.

In *Ontario* by the Act of 1869, 33 Vic., chap. 4, passed to amend the Act of the previous Session, entitled: "An Act respecting elections of Members of the Legislative Assembly" (the 32 Vic., chap. 21), it is enacted "That from and after the passing of that Act, no qualification in real estate should be required of any candidate for a seat in the Legislative Assembly of Ontario; any statute or law to the contrary notwithstanding, and *every such last mentioned statute and law is hereby repealed.*"

Neither the said 32 Vic., chap. 21, nor the preceding Acts of the same Session, chaps. 3 and 4, defining the privileges, immunities and powers of the Legislative Assembly, and for securing the independence of Parliament, point out what shall be the qualifications of a candidate, and the previous Acts in the Consolidated Statutes on the subject have been repealed.

By the 23rd sec. of 32 Vic., chap. 21, 1868 & 9, the electors present on nomination day are to name the person or persons whom they wish to choose or represent them in the Legislative Assembly. There is no restriction as in *Nova Scotia*, that a candidate must have the qualification of an elector, which, among others, is that he shall be a male subject by birth or naturalization, or, as in *New Brunswick*, specifically, that he must be a "male British subject."

In the *Ontario* Act, 32 Vic., chap. 21, sec. 4, it enacts: "No woman shall be entitled to vote," but there is no restriction in



the 23rd section as to the sex of the person or persons whom the electors shall choose to represent them in the Legislative Assembly, nor is there any clause in the two Acts, chaps. 3 and 4, above referred to, from which any such restriction can be inferred. The 61st sec. of 32 Vic., chap. 21, declares "That no candidate shall, with intent to promote *his* election, provide or furnish, &c." But by the General Interpretation Act, passed by the Legislature of Ontario, chap. 1, 31st Vic. (1867-8), sec. 6, clause 8, it is enacted that "words importing the singular number, or the *masculine* gender, shall include more persons, parties, or things of the same kind than one, and *females* as well as males, and the converse."

And by the 3rd sec. of the same Act the interpretation clauses were to apply to all Acts thereafter passed.

Thus it would appear, that if the electors present on nomination day choose a female as a candidate, and, in case of a poll being demanded, she should be elected, she would be entitled to take her seat as a Member in the Legislature of Ontario.

In this respect Ontario differs from the other two Provinces, and may be said to be in advance of both England and the United States on this point.

This difference—assuming that the above construction of the Ontario Act is correct—is one of so much discussion at the present day, that it may not be uninteresting to refer to a very important argument and decision which took place in the Common Pleas in England almost at the time the Act was under consideration in the Ontario Legislature, and which it is presumed must have come under the observation of the very able legal men in that House. The argument was commenced early in November, 1868, and judgment given in January, 1869. The case of *Charlton (appt.)*, vs. *Lings (respt.)*.\* The name of Mary Abbott, with a large number of other women, appeared upon the lists of voters for members of Parliament for the Borough of Manchester. Her name was objected to and struck off by the Revising Barrister. Her statutory qualification otherwise than as a woman was not disputed. On appeal from the decision of the Revising Barrister, the case was argued by Coleridge for the appellant, by Mellish for the respondent. The decision which was to govern the other cases as well as her own was that she had not a right

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\* *Law Times*, new series, 1868-9, 534, 4 L.R.C.P. 374.

to vote. In the course of the argument, some observations were made by the counsel and the judges, which will aid us in the construction to be put upon the Ontario Acts, bearing in mind that the question here is not the right of the woman herself to exercise a right or privilege, but *the right of the electors not to be restricted in the exercise of their rights—that is the right of selection*. And further, whether when in a particular statute, dealing with an entire question, a particular resolution is made with regard to a particular class of persons, it does not negative the application of any other restriction to the same class, than the restriction named, assuming that in other respects the requisitions under the statute are complied with. The Ontario Statute first gives the franchise to every "male person," &c., then as if that was not sufficiently explicit, as if to remove the very doubt which has been raised in England, and to show that the consideration of woman's rights and her position had not been overlooked, it declares "no woman shall be entitled to vote at any election." When it comes to the nomination of candidates, it requires the sheriff to call upon the electors present to name the "person" or "persons" whom they desire to choose without any restriction in such selection as in the case of the franchise to the *persons* being male. By a subsequent Act, c. 4, 1869, the Legislature abolishes the qualification in real estate, thus removing the inference to be drawn as to Knight's service and the feudal tenure referred to by one of the judges in *Charlton vs. Lings*. Then assuming that the selection is of a woman of full age—a *feme sole—compos mentis*—not under any restraint from infancy or marriage or any legal incapacity from crime—does she not come sufficiently under the term "person" to be within the Act. In the case referred to, Mr. Mellish in his very able argument against the construction of the English statute, which Sir John Coleridge was contending for; viz., that woman had the right to vote, because, under Lord Romilly's Act, words imputing the masculine gender included the feminine, says: "No one can doubt that in this Act (that is the Representation of the People Act, 1867), the word "man" is used instead of the word "person" for the express purpose of excluding "woman," thereby admitting that if the word "person" had been used (in the absence of anything else in the Act, to control it) woman would have been included." Chief Justice Bovil, in referring to the Reform Act of 1852, and to the Representation of the People Act, 1867, says: "The con-

clusion at which I have arrived is that the Legislature used "*man*" in the same sense as "*male person*" in the former Act, and this word was intentionally used to designate expressly the male sex, and that it amounted to an express enactment and provision that every man, as distinguished from woman, possessing the qualification, was to have the franchise, and in that view Lord Romilly's Act does not apply to this case, and will not extend the word "*man*" so as to include woman." The other judges, Willes, Byles and Keating, fully concurred with the Chief Justice as to the construction to be put upon the Statute, saying that the words "*man*" and "*male person*," together with the context of the statute throughout, shewed conclusively that it was not intended to confer the franchise on women. Judges Willes and Byles went further, expressing their opinion that women were under a "legal incapacity" from either being electors or elected; the latter observing that "women for centuries have always been considered legally incapable of voting for members of Parliament, as much so as of being themselves elected to serve as members," and he hoped "that the ghost of a doubt on this question would henceforth be laid for ever." Even the casual opinion of such eminent men is entitled to the highest respect, though the point actually under their consideration and decided by them, was the construction of a particular statute as to *the right of a woman to vote*, not as to the right of the electors to choose one as their representative. The language of the statutes before them was different from the language of the Ontario statute. The latter is the one which governs here. It professes to deal with the whole question—being essentially a question—with which the Ontario Legislature had the exclusive power to deal. It classifies and deals with the voters and the candidates separately and exhaustively, and throughout the whole contest there is nothing inconsistent with such a conclusion.

Ansley (Thomas Chasholm) in his able Review of the Representation of the People's Act, 1867, and of the Reform Act of 1832, ably handles the whole subject, and differs entirely from the views laid down by the learned Judges on the case referred to—not upon the broad question, but upon the construction of the Statute. His work was written in 1867, their decision given in 1869. In the course of his work he gives Mr. Denman, Q.C., as authority for the statement that the word "*person*" used in an act of the Legislature of one of the Colonies of Australia had given the franchise to women.

It is also further to be observed, that in the Imperial Act 33 and 34 Vic., c. 75, entitled "An Act to provide for Public Elementary Education in England and Wales," (passed in 1870, since the decision in *Charlton vs. Lings*), which regulates the distribution and management of the Parliamentary annual grants, in aid of public education, and provides for such distribution and management by means of a Board or School Parliament, with great powers, chosen by election by the ratepayers, the word "person" is used throughout with reference to those chosen to form the Board, and under that designation women have been held eligible and taken their seats, notwithstanding that in speaking of such members the word "himself," and other words of the masculine gender only, are used. It would seem, therefore, taking all points into consideration, to require an arbitrary and unusual construction to be put upon such word, to deprive the electors of Ontario of the right of choosing a female representative for their own Legislature, if they be so minded.

In all three of the Provinces persons holding offices of profit or emolument under the Crown, excepting Members of the Executive Government, are debarred from holding seats in the Assembly. In all the three Provinces there must be a registration of Voters, the foundation in all being the same, namely—the Assessment List of the District—the details for the Register of Voters, simply varying according to the qualifications which give the vote, and which entitles the Voter's name to be put upon the List—the exceptional instances in Nova Scotia being when the representatives of a deceased party, or the members of a firm assessed are entitled to vote; and in New Brunswick, when there has been no assessment in the parish for the year for which the List ought to be made up.

In Ontario the voting is *viva voce*.

In New Brunswick and Nova Scotia—By Ballot—introduced in Elections in New Brunswick in 1855; in Nova Scotia in 1870.

#### *The Mode of Conducting the Election.*

The mode of conducting the Election by ballot is very much the same in Nova Scotia as it is in New Brunswick, the most material distinction between the two being that in the several Polling Districts in New Brunswick the Ballots are openly counted at the close of the Poll at each Polling Place, in the presence of the Candidates, or their Agents, duly added up openly in the

presence of all parties, entered in the Poll Books or Check List, signed by the Poll Clerk, and countersigned by the Candidates or their Agents, and the Ballots then forthwith destroyed, the countersigned Poll Book or Check List with a written statement of the result of the Poll at that District, with the signatures of the Candidates or their Agents is then forthwith enclosed, sealed up, and publicly delivered to the presiding officer to be transmitted to the Sheriff to be opened on Declaration Day.

Whereas, in Nova Scotia the Ballot Boxes, with the Ballots are sealed up and sent. This mode was in accordance with the Law first introducing the Ballot in New Brunswick, but, being found liable to abuse, was subsequently amended as above mentioned.

In Nova Scotia—The 17th sec. of the Act of 1870, introducing the Ballot, abolishes the Public Meeting held by the Sheriff on Nomination Day, but he is to attend at the Court House, or other place prescribed, between 11 a. m. and 2 p. m., for the purpose of receiving the names of the Candidates, and he shall exclude all persons not having business in connection with the Election.

In Ontario and Nova Scotia, in case of a General Election, the Polling must be simultaneous throughout the whole Province.

In New Brunswick it is not so; the Sheriff or the Presiding Officer for the County or City selects such time within the writ as he deems most suitable for the convenience of the Electors within his County.

As under the Dominion Act, with the exceptions pointed out, the elections are to be held under the laws which were in force on the 1st of July, 1867, the reforms introduced into Nova Scotia, by the Act of 1870—of the ballot and the abolition of the hustings on nomination day—will not be applicable.

J. H. GRAY.

## LEGAL ETHICS.

"Practice four hours every day in a pistol-gallery," was the advice given seventy years ago, by an eminent member of the Irish bar to a youthful *confrère*, as the most certain means of rising in the profession in the Emerald Isle. The day, however, of duellists is over, it is impossible for any man to shoot himself into practice now-a-days; more peaceful means must be resorted to in order to secure advancement; and although industry, learning and talents may be insufficient to secure a leading position, a careful cultivation of the judges will in a number of instances produce the desired effect; that is if the *dictum* of a judge be recognized by the other members of the bench as an authority in such matters. "My dear .....", said he, "whenever I have a doubt in a case pleaded before me, I always give its benefit to my friend." What charming *naïveté*, what delicious simplicity were exhibited in that outburst of confidence, how they remind one of the honied words of the poet,

"A sympathy  
Unusual join'd their loves;  
They pair'd like Turtles; still together drank,  
Together eat, nor quarrell'd for the choice,  
Like twining streams both from one fountain fell  
And as they ran still mingled smiles and tears.

Verily, if the judges adopt the *dictum* in question, thanks will be due to them for simplifying the administration of the law in this Province. Parties will no longer be distracted by the anxieties now attendant on the prosecution of a suit, counsel will be absolved from the necessity of studying the points of their cases, judges will be relieved from the frightful labour of poring over musty records. The only point requiring care and attention will be the retaining of counsel rejoicing in the friendship of the judges. It may so happen that in order to secure a judgment, three counsel must be engaged, but the increase in numbers retained will redound to the interest of the bar. Kind and liberal feelings between bar and bench will be created and fostered—dependent upon each other, the bench will be entitled to the *liberality* of the bar, and the bar, or at least its favoured members, will receive

the *moral* support of the bench. It may be asked, how is this happy condition of affairs to be brought about? What means should be adopted to insure possession of this legal Utopia? Judges although immeasurably above the common herd of men, superior to the ordinary vices of humanity, and generally impressed with the idea that they possess all attainable knowledge in the science of the law, are, with all due deference be it said, human in some respects. Impecuniosity may afflict some, a craving for the good things of this world may affect others. Relieve the one, satisfy the other, and behold the foundations of *doubtful* friendships. A man's capacity for friendship is either in his purse or in his stomach; fill both and it is impossible for him to resist the kindly feeling. Let, then, the maxim of the profession be "Entertain and Indorse." If carried into practice, the experiment at first may be expensive, but the speculation will be sure to pay in the end.

The benefits which will follow from the adoption of the principle in question will be shared, not only amongst ordinary suitors but also amongst men of means or influence who, in the ardor of the moment, have been tempted to commit crime. It is excessively unjust that men of a high and educated stamp should by the law be regarded in the same light as poor uninfluential fellows, so far as what is technically called crime is concerned. In the one case the respectability of the offender's family is tarnished, he himself is torn from the charms and comforts of his home, his money is useless, and he wastes his years in a penitentiary. The poor devil on the contrary without means and friends, save perhaps his wife and children, who commits a crime, should be punished as an example to his wealthier fellow subjects—his imprisonment redounds to his own benefit—half-starved before, he is now well-fed—ragged and out of elbows at large, he rejoices in his new clothes in prison—his wife and children beg, but they are well rid of their disreputable husband and father. Of old, the benefit of clergy was admitted in mitigation of punishment; would it not be a good idea to legalise it as an excuse for crime in this our day? Poverty in this workday world of ours is a crime, wealth is a virtue. A man's depravity grows with his poverty; his virtues increase in proportion to his wealth. A poor man cannot be honest. A millionaire cannot be a rascal. Wealth gilds everything, and would cast a halo round the head of a criminal. Let us picture to ourselves a trial in such a case,—the wealthy

victim in the dock, the counsel defending, the friendly judge upon the bench; how tender towards the prisoner would be the judge's conduct; how majestic and condescending his deportment towards the jury; how he would define, and refine upon, the points of law; how he would doubt everything, even his own existence, save the respectability and wealth of the unfortunate accused, and how at the last he would dilate upon his vast properties as irrefragable evidence of his innocence. Gracious Heavens! no jury could resist his fascinations, and a verdict of Not Guilty would save him the trouble of reserving a case and discharging the accused from custody on trifling bail. Capital would thus at last acquire its proper position and secure immunity from punishment to its fortunate possessor. The Bar would receive large fees, and the Bench would be indorsed by the signature of every man seeking advancement in his profession.

If, however, it be pretended that the course pointed out is immoral and even disgraceful, and it is desired to secure perfect impartiality in the administration of justice, what means can be taken to secure the desired end. Universal satisfaction upon the subject now pervades all classes of society. It is impossible, say all people, that justice could be administered in a better manner than in the Province of Quebec. The judges are industrious beyond all precedent, in fact, from excess of work they are worn down to skeletons; they are impartial, learned, and talented; charming in their manners, courteous in their behaviour, their civility to the members of the bar is only equalled by their forbearance and brotherly love to each other. The country, in fact, does not appreciate them as it ought, the paltry salaries they receive are no compensation for the immense benefits they daily heap upon society. The temptations to which they are exposed, are incredible, and it is unfair in the highest degree to submit human nature on the Bench to the trials of poverty. The rich man who has never known indigence, who has never experienced the kind attentions of a bailiff, or felt the pangs of hunger, knows not the fascinations of crime, and condemns the poor devil who, to save his wife's life, steals a loaf of bread. Worse, infinitely worse, than that of a man dying of hunger, is the position of a judge, bound to keep up respectable appearances on an insufficient income; day by day he plunges deeper into debt, and becomes the bond-slave of his creditors—his independence lost, his spirit broken, his impartiality destroyed, he must be more than mortal if he can



decide against a member of the bar, who holds one or two judgments against him, and who in the anger of the moment may put an execution into his house. Let us flatter ourselves with the idea that such a state of things does not exist in Quebec, but at the same time let us take the precautions necessary to prevent the occurrence of such a calamity.

If in lieu of the enlightened, talented and learned Bench that we now possess, the highest court in the Province was composed of men—lazy, idle, partial—seeking solely to gorge their salaries as the reward of the smallest possible quantity of work; what would be the consequence to the country at large? Would it be possible for it to flourish with the fountain of its justice impure and polluted. Would not that impurity and pollution be carried through all grades and classes of society? Would commerce flourish, secure from the harpies who would rise and devour all the profits of the fair trader? Would property be safe from the machinations of the ring of conspirators, who would fatten on the labour of honest men? Would life be secure from the rowdies and ruffians who would congregate in our streets, and purchase immunity for their own crimes by being the willing instruments of others higher in the social scale.

If an example be wanted of a great city trodden down into the mire, regard New York. The Corporation of that city within two years plundered to the extent of millions of dollars! The majority of voters ruled by a despicable minority of rogues and cheats—Property insecure—Human life not regarded. And what are the causes productive of this state of affairs? The corruption of the Bench—the indifference of the better classes of society. That enlightened Christianity which there has insured the adoption of the Malthusian doctrine, permits judges to dispose of themselves to the highest bidder. The spirit which accorded freedom to the negro and abolished slavery, has struck the shackles from the limbs of the white judge and allows him to sell himself into bondage. A millionaire may now own any number of fast horses and judges as his private property; the horses for his pleasure, the judges for his business. What a convenient arrangement! "If you have a case at law, go buy a judge," says Mr. James Fisk, "I can recommend to you Judge Barnard," and accordingly Judge Barnard is bought, as one purchases a leg of mutton at a butchers, a little higgling, a little haggling, but all comes right in the end.

Is it wrong then to consider this question of friendship with a judge as one of legal ethics? Friendship in such guise is but a wedge which driven home will so split, rive and destroy our liberties as to leave us but small reason to congratulate ourselves on the administration of justice in the Province of Quebec.

WILLIAM H. KERR.

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### THE QUEEN VS. COOTE.

The prisoner in this case, after conviction for arson, has been liberated on bail by a Judge in Chambers. A detail of the proceedings in the case will enable the profession in the other Provinces of the Dominion, and elsewhere, to form an opinion of the singular tenderness for convicted criminals which pervades the administration of justice in the Province of Quebec.

At the late term of the Court of Queen's Bench, presided over by Mr. Justice Badgley, a true bill was found against Edward Coote for arson. The indictment contained four counts, in each charging him with setting fire wilfully, feloniously &c., to a warehouse belonging to a person of the name of Roy, but in each varying the intent. To this indictment, Coote pleaded not guilty, and a jury being impanelled, he was tried and found guilty. Two depositions sworn to by Coote before the Fire Commissioner for the City of Montreal, then holding an inquiry into the origin of the fire, previous to any charge of arson being made against any person, were, after being duly proved, read to the jury on the trial. On the day appointed for sentence, Coote, through his counsel, made two motions, one that the trial should be declared a mistrial, the verdict quashed and that he should be tried again on the ground that his two depositions taken before the Fire Commissioners had been improperly received in evidence and read to the jury, the other in arrest of judgment, including, amongst some trifling technical grounds, the one relied on in the motion for a mistrial. After argument, Mr. Justice Badgley overruled the motion for a mistrial, &c., in an elaborate judgment, and reserved the motion in arrest of judgment for the consideration of the Court of Queen's Bench, Appeal Side—the Court of Criminal Appeal in the Province of Quebec. No further order was made, and Coote returned to gaol. The court closed on the 11th October.

On the 12th October, in the morning, a petition was presented in Chambers to Mr. Justice Monk, for a writ of Habeas Corpus to bring up Coote in order that he might be liberated on bail. Mr. Justice Monk referred the petition to Mr. Justice Badgley, and it was then and there determined by the two judges to grant the prayer of the petition and they fixed the bail, Coote in the sum of \$2,000 and two sureties in \$1,000 each, exactly the same amount of bail as before trial. Mr. Justice Badgley signed the order for the writ, the bond was acknowledged before him, and Coote was thereupon discharged.

The wording of our Statute regulating Reserved Cases upon the subject of retaining the accused in custody or discharging him upon bail is as follows: "and in either case the court before which the case trial was had in its discretion shall commit the person convicted to prison, or shall take a recognizance of bail with one or two sufficient sureties, and in such sum as the court thinks fit, conditioned to appear at such time or times as the court shall direct, and receive judgment or render himself in execution, as the case may be." (C.S.L.C. c. 77, s. 57).

The Habeas Corpus Act thus provides for the issue of the writ of Habeas Corpus in vacation "and if any person is committed or detained as aforesaid, for any crime (unless for felony or treason, plainly expressed in the warrant of commitment) in the vacation time, and out of term or sessions such person (not being convicted or in execution by legal process) or any one on his behalf may complain to one of the Judges of the Court of Queen's Bench who . . . shall upon request, made in writing by such person, or any one on his behalf . . . award and grant a writ of Habeas Corpus under the seal of the court of which such judge is a member directed to the officer or person in whose custody the party so committed or detained is returnable immediate before the said Judge." \*

It will thus be seen that in the Court reserving a case, is alone vested the power of admitting to bail the criminal whose case is so reserved. Further no Judge in vacation has the power of discharging on bail a criminal convicted of felony. In this case the Court of Queen's Bench, Crown Side, did not order Coote to be admitted to bail; and yet a Judge in Chambers, with the approval of one of his brethren discharged Coote after he had been convicted of felony.

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\* C. S. L. C. c. 95, s. 4.

Apart from the want of jurisdiction apparent in this matter and in these illegal proceedings, a want of discretion, to use the mildest term possible, was manifested by the Judges of the Court of Queen's Bench in the affair. No one knew better than Mr. Justice Badgley that there was nothing in the grounds of the motion reserved to disturb the verdict. A lawyer of six months standing who is not aware of the fact that the improper reception of evidence on a trial is not a ground for arrest of judgment, is ignorant of one of the first principles of his profession, as for the other reasons urged in the motion, they were merely put in as padding and not argued by Coote's counsel. Mr. Justice Badgley must therefore have been intimately convinced that the result of his reserved case would be the rejection of Coote's motion in arrest of judgment and yet he admitted him to bail. To save an unfortunate criminal, who had been convicted of a felony for which he might be condemned to fourteen years Penitentiary, from an imprisonment of two months in gaol, two of the Judges of the highest Court in the Province agree that it is expedient and proper to discharge him upon a bail-bond, which, in all probability, is not worth the paper on which it is written.

For more than ten years bills have been found against many persons for arson, but no case has within that time, save Coote's resulted in a conviction; yet, thanks to the judges of the land, the terror with which incendiaries had been stricken is immediately dissipated, and arson is regarded as an innocent diversion in which any one possessing influence to obtain a reserved case may indulge with perfect impunity.

WILLIAM H. KERR.

## DIGEST OF RECENT DECISIONS.

## QUEBEC DECISIONS.

## COURT OF REVIEW.

Montreal, 29th April, 1871.

*Burnett vs. Monaghan, et al.*—With reference to Monaghan's note maturing on the 11th February, Lanctot, the endorser, gave to the holder the following memorandum: "My note maturing the 10th instant, good for ten days after date." The note referred to was maturing on the eleventh. No other note existed. No protest was made except on the 24th February. Held by the Circuit Court, St. Hyacinthe, that the endorser was liable, and this judgment confirmed in Review. Mondelet J. diss.

*Kingley vs. Dunlop.*—A special replication (*réplique*) is admissible without the permission of the Court. Mackay and Torrance, JJ. Mondelet, J. dissenting.

*Wicksteed et Corporation of North Ham.*—10. A front road cannot be less than 36 feet wide, French measure. 20. At a sale made under the Municipal Act by a Secretary-Treasurer, he is incompetent to buy for himself. Sale set aside. Mondelet, Mackay and Torrance, JJ.

Montreal, 30th June, 1871.

*Adams vs. McCready.*—A purchaser of real estate on which exist mortgages which are prescribed, cannot plead fear of trouble by reason of these mortgages. Mondelet, Torrance and Beaudry, JJ.

*Conlan vs. Clarke.*—A wife has no action against her husband for alimentary allowance on the ground that she cannot be comfortable in the house of her husband. She must reside with him. Mondelet, Mackay and Beaudry, JJ.

*Corporation of Montreal vs. Donigani.*—Mrs. Selby and her brother made a donation of the usufruct of certain real estate to their father. Held that they did not thereby relieve themselves from the obligation to pay the city assessments. Mackay, Torrance and Beaudry, JJ.

*Martineau vs. Beliveau.*—The proprietor of a horse and carriage may be liable for the damages caused by the negligence or fault of the lessee or borrower driving the said horse. Mackay and Beaudry JJ. Torrance, diss.

Montreal, Sept. 30th, 1871.

*In re Morison and Dame Ann Simpson, claimant vs. Henry Thomas, Contg. Party.*—The decision of Mr. Justice Torrance, recorded at page 243 of *La Revue* was reversed in Review, Mackay J. dissenting. Messrs. Justices Mondelet and Berthelot were of opinion that section 57 of the Insolvent Act of 1869 did not apply to dower and other *gains de survie* dependent upon the contingency or condition of survivorship to the husband, these special rights of our civil laws not being expressly mentioned in the provision of the Act. Mr. Justice Mondelet further remarked that even if they had been so mentioned, the provision of the Act would be unconstitutional, the Parliament of Canada having no control over the civil laws of the Province. Mr. Justice Mackay was in favour of Mrs. Morison's claim, because it was founded upon our Insolvent law, interpreted in the way in which the English Courts had interpreted a similar section in the English Statute, the way in which the Courts in Ontario, or New Brunswick, would interpret it.\*

*Lacombe vs. Ste. Marie & al.*—An information for perjury contained in three depositions prepared by counsel was laid before two justices of the peace before arrest. After the arrest no examinations were made of witnesses, nor did the accused confess; yet he was committed to jail, there to be kept till discharged by course of law. The accused was discharged on *Habeas Corpus*, and afterwards for want of prosecution. Action in damages against the Justices for \$5,000. Held, reversing the judgment of Superior Court, that the commitment not being based upon information reduced to writing before the magistrates, was null, and that the magistrates were responsible for the false arrest. Judgment for \$100 and costs. Mackay, Berthelot, Beaudry, JJ.

*Whyte vs Bisson & al.*—A guardian under a writ of compulsory liquidation in Insolvency matters has a right to take out a *saisie revendication* against a seizing bailiff and the creditor, who, although well aware of the issuing of the compulsory writ, persist in holding the estate of the Insolvent under an ordinary writ of execution—in this case a writ of *saisie gagerie*. The bailiff, Mercier, was condemned, jointly and severally with the landlord, to deliver the estate to the guardian and to pay the costs. Mercier was further ordered by the Court, *suo et proprio motu*, to be struck off the list of bailiffs of the Superior Court. Mackay, Torrance and Beaudry, JJ.

#### SUPERIOR COURT.

Montreal, 29th April, 1871.

*Lafond vs. Rankin.*—The purchaser of the book debts of an Insolvent Estate cannot complain that some of these debts have been collected

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\* In the case of Morison, the assignment had been made under the Insolvent Act of 1864; but the claim was not filed till 1870.

by the assignee previously to the auction sale, although the list of debts shewed no such collection when the sale was made. Mondelet J.

*Lavoie vs. Lavoie*.—Plaintiff being aware that the Defendant was a married man sued him in damages for seduction. Held that no action then lies. Berthelot, J.

*Lainé vs. Clarke*.—The word "months" which had been omitted in a note after the word "three" had been inserted by the holder without the knowledge of the indorser. Held, that this was not alteration, and that the indorser was liable. Torrance, J.

*Ex parte Lalonde for certiorari*.—Under the Agricultural Act, the right of certiorari was taken away; but still the writ does lie if the conviction mention no reason for which it was made. Torrance, J.

Montreal, 31st May, 1871.

*Matthews vs. The Northern Assurance Co.*—Introducing into the insured premises a gasoline machine of a dangerous character without the consent of the insurer is a violation of the policy. Mondelet, J.

*Maguire vs. The Corporation of Montreal*.—A corporation is not responsible for the negligence of others in leaving obstructions in the street, when it appears that the driver might have avoided the obstructions. Mondelet, J.

*Vallée vs. Kennedy*.—A simple clause in a lease against subletting without the consent of the landlord does not give rise to the immediate rescission of the lease; the court will first grant to the Defendant a delay to re-establish things as before the sub-lease. In this case the sub-tenant vacated the premises before judgment, and the defendant was only condemned to pay the costs. Mackay, J.

Montreal, 30th Sept. 1871.

*Massawippi Valley R.R. Co. vs. Walker*.—No stock of an incorporated Company can be called for, unless the conditions antecedent to such call have been complied with. Mondelet, J.

*Brown vs. The Corporation of Montreal*.—Action in damages for libel. The defendants demurred upon the ground that an action for libel did not lie against a corporation. Held that civil corporations are governed by the laws affecting individuals. Demurrer dismissed. Beaudry, J.

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#### CIRCUIT COURT.

(APPEALABLE).

Montreal, 30th Sept. 1871.

*Dumaine vs. The Corporation of Montreal*.—Held that a City Treasurer had no authority to take a note for City assessments. Mackay, J.

*Campbell vs. The Grand Trunk Railway*.—Notwithstanding notice of special conditions given by common carriers, limiting their liability

and their knowledge thereof, they are responsible for the damage caused by their fault or the fault of those for whom they are responsible. Torrance, J.

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COURT OF QUEEN'S BENCH.

(APPEAL SIDE).

Montreal, 9th June, 1871.

*Shaw vs. Laframboise*.—Under a clause in a lease the tenant had promised to pay *all the taxes on the premises, ordinary and extraordinary, foreseen and unforeseen* during the lease. Held, that this clause did not comprize taxes for the widening of streets, for which compensation had been paid to the landlord. Badgley, Monk, Drummond, JJ. Dissenting, Duval, C. J. and Caron, J.

*Proulx & Dorion*.—A intervened in a deed and agreed to pay a debt due to B, not a party to the document. B brings his action for the amount against A, without previous acceptance of the delegation. Held that B had no right of action. Duval, C.J., Badgley and Drummond, JJ. Dissenting, Caron and Monk, JJ.

Montreal, September 6th.

*The Corporation of Montreal & Doolan*.—Rights of individuals against a corporation are governed by the French law, and according to that law a corporation is liable for the damage caused by the assault and battery of one of its officers when on duty. In this cause, two policemen had illegally arrested and ill-treated a cab driver :

Held. That the Corporation was liable in damages. Caron, Monk and Drummond.—Dissenting; Duval and Badgley.

*Brown & Lemieux*.—That a lease of moveable property containing at the same time a promise of sale, dependent on the payment of certain instalments is a conditional sale, and therefore on non-payment of the balance of the same, the vendor cannot proceed by *saisie revendication* against the purchaser. The action should be for rescission of the sale. Caron, Badgley, Monk, Drummond, JJ. Dissenting; Duval, C.J. Messrs. JJ. Caron, Badgley and Drummond, would not, however, dismiss Plaintiff's demand for a condemnation against the purchaser to pay the instalments due. Action maintained *pro tanto*, but *saisie revendication* set aside. Mr. Justice Monk, with the Court of Review, thought that in a *saisie revendication* no such condemnation could be made.

*Corporation of Eton and Rogers*.—Municipal corporations are responsible for injuries sustained by an accident at a certain bridge, which was not a public one, but was regarded as such.

*Attorney-Général Ousmet & Hon. J. H. Gray et al.* Held: That with preliminary pleas fyled in time, the fying of pleas to the merits *without demand* is not a waiver by Defendant of the benefit of a preliminary



plea, v. g. *an exception déclinatoire*. Duval, C.J., Caron, Drummond, Badgley, JJ. Dissenting; Monk, J.

Montreal, 8th Sept., 1871.

*Grand Trunk Railway & Gutman*.—Notice of arrival of goods being given by the Company to the owners or consignees that they "remain here entirely at the owner's risk, and that this Company will not hold themselves responsible for damage by fire, the act of God, civil commotion, vermin or deterioration of quantity or quality, by storage or otherwise, but if stored, that a certain rate of storage would be charged for the storage of the goods," and which was paid to the Company by the owners.

Held: That though the liability of the Company as common carriers had ceased, by the arrival of the goods, the Company was still liable for damage as warehousemen and bailees for hire; but that in this cause the evidence did not show any negligence on the part of the railway company. Duval C.J., Monk and Stuart (*ad hoc*) JJ. Contrà, Badgley and Drummond, who held that by law negligence was presumed if damage shewn, and the onus of proof of care was on the Company, who had made no proof whatever to rebut the presumption against the Company.

September 9th.

*Papineau & Guy*.—Monies deposited with the Prothonotary are held under judicial authority, and recourse can be had to the survivor of the then Joint Prothonotaries by a rule or summary petition to enforce payment, even by imprisonment or *contrainte par corps*. Per Duval, Caron and Polette *ad hoc*, JJ. Contrà, Badgley and Drummond, who contended that recourse should be by action only.

September 7th.

*Brown & La Fabrique de Montréal*, or the Guibord case.

Mr. Justice Badgley: A *mandamus* or *requête libellée* attached to it, will be quashed and set aside if more than one duty or right, complete in itself, is demanded from the same party, who is not bound or held in law to perform more than one of those demanded, and consequently as widow Guibord demanded *civil burial*—which duty was within the province of the *Fabrique* to perform—and also the *registration of the burial*—which duty belongs to the *Curé* alone—the proceedings are bad and informal, and must be quashed. The learned Judge was of opinion, however, that the writ of summons specially ordered by the Judge to issue with *requête libellée* attached thereto and the order indorsed on the writ of summons, was sufficient.

Mr. Justice Caron: 1. That under article 1022 of the Code of Civil Procedure a writ of *mandamus* must be specific as in England. A simple writ of summons annexed to Petition containing all the necessary averments, is not sufficient. 2. In this case the proceedings were illegally directed against the *Fabrique*; the burial as well as its entry in the register of deaths being within the province of the *Curé* alone, who was not in this cause. 3. That civil burial only was

VOL. I. II No. 4.

demandé, and that the immemorial usage prevailing with respect to Montreal Catholic cemetery, and in all the Catholic cemeteries of this Province, under which civil burial was only made in that part of the cemetery reserved for the burials of *non Catholics*, known as *le cimetière des enfans morts sans baptême*—was law, and should be enforced as such.

Mr. Chief Justice Duval: The proceedings were bad; 1. Because the writ was a writ of summons and not a writ of *mandamus* in the English form. 2. Because they were directed against the *Fabrique* alone, and not at the same time against the *Curé* of the parish. 3. Because the demand of burial in the Petition, *conformément à l'usage et à la loi*, is vague and uncertain, it being known that there are two modes of interments recognized by law and usage, the civil and ecclesiastical.

Mr. Justice Monk: Interment in the Roman Catholic cemetery, *conformément à l'usage et à la loi*, is an act partaking partly of ecclesiastical and partly of civil function. Courts of justice have no jurisdiction over the ecclesiastical part. The burial of Guibord being asked in that part of the cemetery destined by ancient usage to the interment of those who alone are entitled to ecclesiastical burial, courts of justice therefore have no jurisdiction to order the same. As to civil burial it has been offered.

Mr. Justice Drummond was of opinion that as the demand was of an ecclesiastical or spiritual nature, courts of justice in this country, governed by a Protestant Sovereign, could not interfere, as they would have done before the cession to the British Crown, especially in face of the Treaty of Paris assuring the free exercise of the Church of Rome in Canada.

In fine, MM. Justices Drummond and Monk were of opinion that the form of the proceedings was correct.

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We are indebted to Mr. Colston for the following digest of cases lately decided in the City of Quebec:—

#### COURT OF QUEEN'S BENCH

(APPEAL SIDE.)

Quebec, 19th June, 1871.

*De la Gorgendière vs Thibodeau*.—The 4th Vic. c. 3, s. 36, does not prohibit a wife from renouncing to the exercise of her hypothec for matrimonial rights in property sold by her husband, and such renunciation is valid and binding though subsequently she obtains a *separation de biens* from her husband. Dissenting, Duval C.J., and Drummond, J.

*Harris & Schowb et al.*—The declaration herein alleged that on the 27th day of August, 1870, C. & J. Lortie made their draft at 3 days on

J. Redpath & Son, Montreal, which they handed to Harris, who on the 29th endorsed it over to Schowb et al; that the latter presented it for acceptance on the 1st of September following, which was refused, and that said draft was protested for non-acceptance on the 8th day of September.

Held: That plaintiffs did not use legal and sufficient diligence in and about presentment and protest of the draft, and action dismissed. Dissenting, Badgley J.

*Poulin & Wurtle*.—The appellant, defendant in Superior Court, was served with the writ of summons on the 4th of November, the 15th of that month being the day of return, and his domicile being distant 19½ miles from the Court House at Quebec, where he was ordered to appear.

Held: That the service was good, the delay between service and return being sufficient. There must be full five leagues in excess of the first five to give a defendant the right to an additional day.

*Villeneuve & Bédard*.—Jugé: Que la démence, la folie et la fureur du mari ne sont pas des motifs qui peuvent justifier une demande en separation de corps de la part de la femme. Dissenting, Duval C.J., and Drummond J.

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#### COURT OF REVIEW.

Quebec, 4th May, 1871.

*Hall vs Devany*, 1380.—Payment on account of interest or principal interrupts prescription, and in commercial matters before the Code parol testimony of such payment was admissible. The payment, however, must be accompanied by such circumstances as would warrant a jury in inferring a promise to pay the balance.

A payment on account, therefore, by a person claiming a further credit of £20 is at most an acknowledgement of the debt less £20.

*Bélanger vs Blais*, 931.—The plaintiff held, without title, part of the unconceded lands of the Crown and made thereon considerable improvements. He subsequently ceded the same by donation duly enregistered to one Sans-Souci, subject to a life rent, for securing which Sans-Souci mortgaged the property in question. Sans-Souci obtained from the government a location ticket and subsequently sold to the defendant, who knew of the donation. The defendant afterwards obtained Letters Patent from the Crown in his own name. Action by Plaintiff en declaration d'hypothèque against Blais. Judgment for Plaintiff. Meredith C.J. dissenting.

28th June, 1871.

Present:—Meredith C.J., Stuart and Taschereau JJ.

*Joseph v. Turcotte*, 641.—Prior to the proclamation declaring American silver uncurrent the Defendant made his note in favour of the

Plaintiff, payable in silver at par. The note matured after such proclamation.

Held : That the proclamation did not affect subsisting contracts, and that a tender, which would have been accepted before it, was valid thereafter. Stuart, diss.

*Pacaud vs. Provencher*, 362.—Held : That a hypothecary action will not lie on a transfer which has not been notified to the original debtor.

*Milot vs. Chagnon*, 426.—Held : That where there was reasonable and probable cause for issuing a *capias* no damages will be granted though the *capias* had been quashed for defect in form.

*Basin vs. The School Commissioners of St. Anselme*, 456.—Notice of action must be given to School Commissioners before an action of damages can be brought against them.

5th October, 1871.

*Sheppard vs. Dawson, and Dawson, oppt.*—Under Art. 453, C. P. C., a party to a suit must after discontinuing any proceedings actually pay the costs incurred thereon by his adversary, before he can begin again. The obligation to pay costs in this case can only be extinguished by payment, and not v. g. by compensation. Stuart, dis.

*Phillipsthal vs. Duval*.—This case, an action of damages for slander, came before a jury and at the trial the defendant having examined no witnesses, the Court (Stuart J.) held that the Plaintiff had no right to address the jury in reply. On motion for new trial based on this and other grounds it was held, by Stuart J. : That under the circumstances no right of reply existed; by Meredith C. J. : That the refusal of the right to reply was no ground for a new trial, where, as in this case, no injustice had resulted from it. Motion dismissed. Taschereau, dis.

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#### SUPERIOR COURT.

Quebec, 8th April, 1871.

*Hunt vs. Home Ins. Co.*, 1130.—A chirographic creditor has no insurable interest in the stock-in-trade of his debtor, and cannot hold an insurance against fire thereon. Stuart J.

6th May, 1871.

*Tardif vs. Gingras & Jobin* contest., 658.—A supplementary distribution will be ordered, after homologation of a report, upon proof of error in the certificate of registrar, and that no hypothec exists in favour of the person collocated. Taschereau J.

*Evanturel vs. Evanturel*.—The clause in a will depriving a legatee of his legacy in case he contests the will, is contrary to public order, illegal and null, and will be regarded as *comminatoire* only. Taschereau J.

7th October.

*Lemesurier vs. Ritchie*, 1544.—The defendant pleaded to the action herein that the notes in which the action was based were not stamped as required by law. Motion by the Plaintiff for leave to affix the necessary stamps. Granted on payment of costs, and with privilege to defendant to plead *de novo*. Stuart J.

*Paquet vs. McNab*, 826.—Held: that the reason assigned by the Plaintiff in his affidavit for a *capias*, for believing that the defendant—a person domiciled without the Province—was about to leave the Province with intent, &c., “que le defendeur est prêt de partir dans son dit batiment pour faire voile pour l’Europe ou autres parties du monde,” is insufficient. *Capias* quashed. Stuart J.

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A manuscript written nearly forty years ago, by L. Adams, advocate of the City of Montreal, now in the hands of our friend Mr. Girouard, contains the following unreported decisions. We quote *verbatim*.

*Ricard vs. St. Denis*.—On an opposition claiming a privilege for rent the Court held that the opposant could only have a lien by verbal lease for three terms expired and the current one. 20th Oct., 1826.

*Wilson vs. Spencer & Smith opp.*—Judgment for rent on *saisie gagerie*. Execution issued, sale of goods advertised, but money paid before sale or on the day fixed, and returned into Court: opposant claimed a dividend on the ground of defendant's insolvency, and founded her demand on the circumstance of the goods not having been sold, but the debt paid, and there being no privilege upon money paid upon an execution for rent, but only on the proceeds of the sale of goods seized upon the premises and sold. *Per curiam*: Judgment must go for the plaintiff, and the opposition dismissed, on the ground that the money levied or paid represented the goods which had been seized, they having been given up and discharged in consequence. 20th Feb. 1828.

*Gates & al. vs. another*.—Judge Pyke: an assignment by bankrupt estate vests in the assignees, who may bring action thereon in their own name without notice. No notice of assignment necessary, when debt remains due and not attached by other creditors, even on common assignments.

*Olivier vs. Bélanger*.—On *opposition afin de distraire* on the ground that only bidders were the crier and bailiff. *Per curiam*: Sale must have been made or a new writ issued. The plaintiff had a right to bid either for himself or another, and the *saisi* had no right to complain if there are no bidders; he should have procured them. There is no necessity that there should be three, two, or more than one, if no friend appears. Opposition dismissed.

*Stein vs. Seath.*—Action for obstructing a navigable river. *Per curiam*: No person can obstruct a navigable river with impunity, and award plaintiff £50 for injury done his raft. The removal not ordered, as the obstruction became more properly the object of public prosecution, and that part of demand dismissed.

*McKenzie and Quebec Bank.*—Held that when a trader in business ceases, and his debts remain unpaid, this is a *faillite* which would exclude all preference. In Appeal, April, 1830.

*Frost & al. and Cameron and Gray & al., T. S.*—On attachment by *saisie arrêt* of monies of the defendant in the hands of the *tiers saisis*. Judgment of the Court below reversed. The Court were of opinion that the delay was stipulated in favour of the *tiers saisis*, that they should not be held to pay what they owed to the respondent, until after six months' notice had been given to them, could not affect the rights of the respondent's creditors, who were entitled under their judgment to attach all the debts and property of their debtor, however held, or in whatever manner due. That here the money in the hands of the *tiers saisi* was a debt they owed to the respondent, the nature of which could not be varied by the delay allowed for the payment of it; and as all that the *tiers saisi* could demand was a six months' notice before they were bound to pay, the appellants here were entitled to obtain the money on giving that notice. In this there could be no injustice—a contrary principle might lead to it. In Appeal, April, 1830.

*Montgomery & Price.*—On declaration made by Alexander C. Montgomery, as Garnishee—which was contested in the Court below. Judgment of Court below affirmed. The Court were of opinion that the possession taken by the appellant of the debtor's property was a matter which might be brought into discussion by the contestation raised on the declaration made by the appellant in the Court below, and as this possession was in fraud of the creditors, that he was liable to pay to those creditors the full value of that property. That this value having been ascertained, and it appearing that the appellant had disposed of the goods as his own property, the Court had rightly directed that value to be paid by the appellant and to be secured for the benefit of the creditors. In Appeal, April, 1830.

*Gerrard & Hays & al.*—Action brought by residuary legatees of the late David David for £10,590 16s. 5d., amount of promissory note in his favour. The defendant Gerrard denied that the respondents were the legal representatives of the late David David. A trial by jury was asked and granted. In appeal. Mr. Justice Kerr said that on the first question, namely, whether this case should be submitted to a jury, the Court were unanimous that this was one of the cases that should go before a jury. The action was brought by persons who were the representatives of a merchant—based upon a promissory note given by one merchant to another. We must look to the con-

tract at its inception—it was evidently mercantile—and as to any questions of law that may arise during its investigation, the judge will direct the jury as to what is the law, or they may return a special verdict, and the point of law be reserved for argument. Chief Justice Sewell fully agreed as to this being a proper jury case; and repeated the same reasons urged by Mr. Justice Kerr on that subject. It would be very dangerous to refer the facts of any case to two different tribunals, because the Court might be of opinion *pro*, and the jury *contra*. That decision therefore must be confirmed. In Appeal, Nov. 1830.

*Patterson vs. Usborne*.—As far back as 1809, the premises in question, situated in Hope street, Quebec, were sold by Usborne to Patterson, and were described as 131 feet towards Hope street. It turned out, however, that there was only 100 feet front, but the back of the premises extended to 175 feet, and the lot contained even more than was intended to be conveyed. Finally, the deed of sale contained a full description of the boundaries on each side, beginning at one described spot, and going round to that spot again. Hence the present action in damages for the deficiency. Mr. Justice Bowen considered that the question was whether the deed of sale was a sale by measurement or not; if by measurement, natural guarantee of the original seller remained; here the bounds were not only described, but the measurement, to a single foot, was stated in the deed. . . . This question has already been twice adjudged, and must be determined the same way now as then. Mr. Chief Justice Sewell said, that departure from a former judgment, if an erroneous one, was no impeachment of justice; in this instance he thought it could not be said that the Court had formerly done wrong. The sale could not be denied to be one by admeasurement, and no one who sells 100 feet as 131 feet, can be allowed to take money for that which he does not deliver. Judgment for plaintiff. In Appeal, 13th June. June term.\*

*Fraise vs. Harvicker*.—Action in damages for seduction. Sewell, C. J. It was with great reluctance the Court was called on to decide similar cases, and could not, in any way encourage or protect such connections as had been proved to exist in this instance. It was therefore impossible that anything could be given in the way of damages for seduction. A woman who submits to evil in the way of a kept mistress can claim none: damages for seduction in the first instance are always claimable, but a woman who consents to live in an unmarried state with a man, is entitled to none. It was quite different, however, with regard to the issue of such connection; the court was bound when called on, to interfere and protect them; to see that they were duly supported and taken care of, according to the circumstances of the parties. K. B., 7th June.\*

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\* N.B.—1830 or 1831.

*Gibson vs. Heney*.—Action for £96 10s. 8d. for goods sold and delivered to defendant's wife, 1829. Plea that they were bought without his authorization and knowledge and that the articles were of luxury and extravagance. At *enquête*, it appeared that Mrs. Heney was the daughter of the late Hon. Judge Foucher, and the wife of an Alderman of the City of Montreal—that articles of dress of similar description as those bought by Mrs. Heney, both as to quantity and quality, were worn by ladies in a society below that in which Mr. H. allowed his lady to move. That they lived happily together, and had entertained and were entertained by the Governor—that Mr. H. generally saw the articles worn by his lady, and especially a rich embroidered robe and thread lace trimming to receive the Governor at her house, and a satin slip and turban, with ostrich feathers, to attend his Levee. In the court below, K. B. reduced the account to £21 11s. 5d. and rejected 4-5th's of the account as *extravagant and luxurious*. In appeal, this judgment was confirmed, the appellants (milliners) being condemned to pay the costs of appeal, the court citing two cases from Dallas and 5 Taunton, p. 356; Bentley v. Griffin. July term. \*

*Symard vs. Lynch*.—Judgment was this day rendered in this cause by the Chief Justice and Mr. Justice Pyke, maintaining the principle that application should be made of payments on account of principal and not on account of interest till after the principal was paid. J. Rolland, dissenting. 20th April, 1831.

*Dunn vs. Campbell and Campbell*.—*Per curiam*: Application of payments should be made on account of principal. Instructions sur les Conventions, 331; Poth. No. 544; Argou, 398, 399; Ord. 1667.

*Parker vs. Richard*.—P. C. Monies paid must be applied to the payment of the principal, when no application is made. Rep. v. *Imputation*; Argou: Denizart, N.; Pigeau, 608.

## ONTARIO DECISIONS.

*Pew vs. Lefferty*.—A bequest was made to the son of the testatrix, payable on his attaining twenty-one, provided he continued a steady boy and remained in some respectable family until that time, with a bequest over if he did not do so. Without any reason being assigned therefor, the legatee enlisted and served as a private soldier in the army of the United States during the time hostilities were carried on against the then Confederate States.

Held: That the son by such conduct had not performed the condition upon which alone he was to be paid the legacy given by his mother's will.—U. C. C. C. (or Court of Chancery Reports) vol. xvi, p. 408.

*Alian vs. Clarkson*.—In 1869, C lent money to N, on an express agreement that it was to be secured by mortgage on certain property,



and on the 3rd July, following, the mortgage was given accordingly, and on the 2nd August the mortgagor became insolvent.

Held: That the mortgage was valid. C. C., vol. xvii, p. 570.

*Buchanan vs. Smith.*—An insolvent compounded with his creditors and had his goods restored to him; he thereupon resumed his business with the knowledge of his assignees and creditors, and contracted new debts. It was subsequently discovered that he had been guilty of a fraud which avoided his discharge, whereupon he absconded, and an attachment was sued out against him by his subsequent creditors.

Held: That they were entitled to be paid out of his assets in priority to the former creditors.

In such a case the assignee, as representing the former creditors, was ordered to pay the costs of a suit brought by the subsequent creditors to enforce their rights. C. C., vol. xviii, p. 41.

*Kirby vs. Hall.*—In an action on a promissory note, by a subsequent holder, the only question raised by the plea was, whether or not, when he became the holder or received the note, the Plaintiff had complied with the Stamp Act by availing himself of the privilege of affixing the double stamps, the note having been formerly held to have been insufficiently stamped in the hands of a previous holder, who had, in consequence, failed to recover upon it.

The evidence, however, clearly shewed that when the note was received by the Plaintiff, which he swore it was in good faith and for value, he did affix the double stamps, which were also duly cancelled, but that he was aware, when he took it, of the former difficulty about the stamps.

Held: That the Defendant could not avail himself, under the pleadings of this fact, if a defence, but that, as the record stood, plaintiff came within the protection of sec. 9 of 27 & 28 Vic. chap. 4. U. C. C. P., vol. xxi, p. 377.

*Royal Canadian Bank vs. Shaw et al.*

Held: That the Plaintiffs, a banking institution, having stipulated for and retained, in discounting a note, interest at a larger rate than 7 per cent., were not entitled to avail themselves of the provisions of their Act of Incorporation (27 & 28 Vic., ch. 85, sec. 21), allowing them to charge the same rate after maturity that they had charged on discounting the note, supposing the original charge to have been not more than 7 per cent., which was held to be the meaning of the Act, and that therefore, the note bearing no rate of interest on its face, they were not entitled to more than 6 per cent. from its maturity. C. P., vol. xxi, p. 455.

*Maunder vs. Royal Canadian Bank.*—Plaintiff deposited with Defendants a sum of money and received from them the usual deposit receipts, stipulating for payment of interest provided the money remained not less than three months from date of deposit, and providing for fifteen day's notice to be given of its withdrawal, on which notice

interest was to cease. Subsequently Plaintiff signed his name thereto and delivered it to the endorsees. Before S. & Co. notified Defendants of the transfer to them, Plaintiff gave them notice that he revoked and countermanded it, but Defendants, notwithstanding, paid it over to S. & Co. on receiving an indemnity from them. Plaintiff subsequently made a formal demand upon Defendants for the money, which was not complied with.

Quære: In an action by Plaintiff against Defendants how far they were authorized to set up in answer, as a payment good in equity, that the deposit receipt had been transferred by Plaintiff to S. & Co., and that they had paid the amount to S. & Co. accordingly. C. P., vol. xxi, p. 492.

*Munro vs. Cox.*—Declaration on a note payable to G, or order. Plea *non fecit*. The note when produced was payable to G or order, "for the use of M."

Held: No variance, for it was declared on according to its legal effect.

There was also an equitable plea, setting out facts which, if true, shewed that M, was not entitled to the money, and alleging that the Plaintiff, the endorsee of G, took it with notice.

Held: That the fact of the note being expressed to be for the use of M, was no evidence of such notice, for this shewed only M's right as against G, whereas the plea was in denial of his right. U. C. Q. B. vol. xxx, p. 363.

*Macklem & al. vs. Thorne & al.*—Upon a sale of hides by weight, of specified qualities, according to inspection, *i. e.* "cured and inspected No. 1 hides" &c.

Held: That the weight was ascertained and marked by the Inspector, under 27-28 Vic., ch. 21, and 29-30, Vic. ch. 24, were binding upon the parties, in the absence of anything in the agreement to the contrary.

Held, also: That the seller must pay the Inspector's fees, the agreement not providing otherwise.

Held, also: That upon the evidence, set out in the case, the Defendants were acting as principals, not as agents for the Plaintiffs, the purchasers, and therefore could not charge commission. Q. B., vol. xxx, 464.

*McInnes vs. Milton.*—Where the Defendant signed, as maker, a printed form of a promissory note, and handed it to A, by whom it was filled up for \$855, and the Plaintiffs afterwards became endorsers of it for value without notice.

Held: That the Defendant was liable, though it might have been fraudulently or improperly filled up or endorsed. Q. B., vol. xxx, p. 489.

*The Royal Canadian Bank vs. Kerr.*—A banking firm in Toronto, having become embarrassed by gold operations in New York, applied

to the Plaintiffs to whom they owed \$50,000, to advance them \$15,000 more; and in order to obtain the advance, they offered to secure both debts by a mortgage on the real estate of one of the partners, worth \$30,000. The Plaintiffs agreed, made the advance and obtained the mortgage. In less than three months afterwards the debtors became insolvent under the Act. They were indebted beyond their means of paying at the time of executing the mortgage, but they did not consider themselves so, nor were the mortgagees aware of it. The mortgage was not given from a desire to prefer the mortgagees over other creditors, but solely as a means of obtaining the advance which they thought would enable them to go on with their business and pay all their creditors.

Held: That as respects the antecedent debt, the mortgage was valid as against the assignee in insolvency. C. C., vol. xvii, p. 47.

*The Queen vs. Pattee.* A *sciri facias* to set aside a patent at the instance of a private relator without the fiat of either the Attorney-General of the Dominion or of Ontario having been first obtained. Held: 1. That a fiat was necessary. 2. That the Attorney-General of Ontario was the proper authority to grant the fiat in such a case. Canada Law Journal, vol. 7, p. 71.

*Clemens qui tam vs. Berner.* Returns of convictions and fines for criminal offences being governed by the Dominion Statute, 32-33 Vic., cap. 31, sec. 76, and not by the Law Reform Act of 1868, are only requested to be made semi-annually to the General Sessions of the Peace. *Semble*, that the right to legislate upon this subject belongs to the Dominion Parliament, and is not conferred upon the Provincial Legislatures by the B. N. A. Act, 1867. (7 C. L. J. 73).

## ENGLISH DECISIONS.

**BILL OF LADING.**—B bought cotton for A, at his request, and B transmitted a bill of lading and invoice thereof to C, his correspondent. The invoice, a duplicate of which was sent to A, described the cotton as shipped "on account and risk of A." C sent A the bill of lading, with a bill of exchange unaccepted, but retained the bill of lading. C stopped the delivery of the cotton to A.

Held: That accepting the bill of exchange was a condition precedent to the right to hold the bill of lading, and that in this case the cotton remained the property of B.

*Shepherd & Harrison.* 5 L. R. H. L. 116; s. c. 4, L. R. Q. B. 196, 493.

**CONTEMPT.**—By the Constitution Act for the Colony of Victoria, (The Imperial Statute 18 & 19 Vic. c. 55, s. 35, and the Colonial Act 20th Vict. No. 1) power is given to the Legislative Assembly of Vic-

toria to commit by a general warrant for contempt and breach of privilege of that Assembly.\*

G. was declared, by the House of Assembly of Victoria, to have committed a contempt and breach of privilege, and, under the Speaker's Warrant, which was in general terms, without specifying any specific offence; G. was committed to gaol. G. was afterwards brought up by Habeas Corpus and discharged out of custody by the Chief Justice of the Supreme Court in the Colony, on the ground that the above Constitution Statute and Colonial Act did not confer upon the Legislative Assembly the same powers, privileges and immunities as are possessed by the House of Commons. On appeal *held* by the Judicial Committee:

First: That the Statute and Act gave to the Legislative Assembly the same powers and privileges as the House of Commons had at the time of the passing of the 18 & 19 Vic. c. 55, of committing for contempt.

Secondly: That, incident to those powers and privileges, there was vested in the Legislative Assembly the right of judging for itself what constituted a contempt, and of ordering the commitment to prison of persons adjudged by the House to have been guilty of a contempt and breach of privilege by a general warrant without setting forth the specific grounds of such commitment; and

Thirdly: That as G. had been guilty of a contempt and breach of the privileges of the Legislative Assembly, and had been duly committed; therefore, the Supreme Court had no power to discharge him out of custody.

Special leave to appeal granted, on the ground that the question raised was one of public interest, involving the Constitutional rights of a Colonial Legislative Assembly. On reversing the order of the Court below, no costs were given, as the appeal was only allowed to decide the abstract question.

*The Speaker of the Legislative Assembly of Victoria, Appell., & Hugh Glass, Respdt.* 3 L. R., P. C. 560.

CONTRACT.—A pianist engaged to play on a certain day, but was prevented by illness.

Held: That there was an implied condition in the contract that illness should excuse her.

*Robinson vs. Davidson.* 6 L. R. Ex. 269.

CRIMINAL LAW.—A woman living apart from her husband, and having custody of their infant child, left it at her husband's door,

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\* See for like power given to Senate and House of Commons of Canada, The British North America Act 1867 & 31 Vic. c. 23, s. 1 (Canada).

telling him she had done so. The husband allowed it to remain from 7 P.M. to 1 A.M.

Held: That the husband was guilty of wilfully abandoning and exposing the child.

*Reg. vs. White.* 1 L. R. C. C. 311.

The Defendant killed a number of rabbits, left them in bags in a ditch, in the grounds where killed, as a place of deposit, and subsequently returned and took them away.

Held: That the killing and taking away were one continuous act, and the Defendant was not guilty of larceny but felony.

*Reg. vs. Townley.* 1 L. R. C. C. 315.

A reduction to writing of an oral statement previously given under oath, is a deposition, though not itself sworn to.

*Reg. vs. Fletcher.* 1 L. R. C. C. 320.

**DOMICILE.**—A British subject domiciled in France, had two illegitimate children by a French woman, whom he afterward married, when the children were legitimated according to the law of France.

Held: That the status of the children in Englan was to be determined by the law of France.

*Skottowe vs. Young.* 11 L. R. Eq. 474.

**RAILWAY.**—Plaintiff took a ticket from Defendant, railway company, from A to C, at B, between A and C, said company's line joined the line of another company, over which the Defendants had, by Act of Parliament, running powers to C, on payment of tolls, the traffic arrangements being with the second company by said Act. Defendants train ran into a train of the other company, through negligence of the latter, and the Plaintiff was injured.

Held: That the Defendants were liable for such negligence. It seems the contract is that reasonable care shall be exercised by all by whom such care is necessary, for reasonably safe conveyance to the end of the journey.

*Thomas vs. Rhymney Railway Co.* 6 L. R. Q. B. 266, s. c. 5 L. R. Q. B., 226.

**WILL.**—Testator owning real estate in England and Scotland devised "all the rest, residue and remainder of my real estate situate in any part of the United Kingdom, or elsewhere," in trust for his two sons. The will was incompetent to pass the Scotch estate, which descended to the eldest son as heir.

Held: That the heir must elect, between the Scotch estate and the benefits under the will.

*Orrell vs. Orrell.* 6 L. R. Ch. 302.

## AMERICAN DECISIONS.

*Merchants' Bank vs. State Bank.*—The Merchants' Bank of Boston bought certain gold, in certificates and coin, under a contract with M, by which M had a right to purchase of the bank the same amount on certain terms. After this, M. & S., cashier of the State Bank, came together to the Merchants' Bank, and said they had come for gold, S. saying that he would pay for it by certifying M's. cheques. The gold was delivered to S. who wrote on two cheques drawn by M. on the State Bank, "Good," signed by himself as cashier, and gave them to the cashier of the Merchants' Bank, the next day. The president of the latter presented them for payment at the State Bank, when S. told him that the certificates had been there, but were not there now and that he would get the money and pay the cheques. It was not shown what became of the gold. M. had no deposit in the State Bank, and it refused to pay the cheques, denying its cashier's authority to certify them. Both banks were organized under the National Banking Act, and had the powers given by it; among others the power of buying gold. The by-laws of the State Bank made the cashier "responsible for the moneys, funds and other valuables of the bank," and required that all contracts, cheques, drafts, receipts, &c., and all indorsements necessary to be made by the bank, "should be signed by him or the president. The directors had not defined his duties more specifically, but it appeared that S. was intrusted by the directors with large powers, without a special delegation of authority; that an account was kept between him and the bank, which represented his transactions; that he gave cheques in lieu of bills, when discounts were made; gave cheques for the purchase of exchange, and for money borrowed of other banks, and had done so to a very large amount. A large number of cashiers from other banks in Boston testified that they exercised the same powers, and were authorised to borrow and lend the money of their banks, and to each other, and to pledge the credit of their banks; and that these transactions were uniformly conducted on the faith of the cashier's implied powers. There was no proof that either S. or any of them had ever certified cheques or purchased gold; the Supreme Court of Massachusetts having decided that a teller could not certify cheques.

Held: 1. That if the certificates and the gold actually went into the State Bank, the bank was liable for money had and received, whatever defect there may have been in the cashier's authority to buy them. 2. If they did not, it was a question for the jury upon the evidence as to the powers exercised by him and the usage of the other banks, whether his power to bind the bank by his contract might not fairly be inferred, applying the rule that where an innocent party deals with a corporation, unaware of any defect in its agent's authority, and there being nothing to excite suspicion, if the contract can in fact be valid under any circumstances, the party has a right

to presume their existence, and the corporation is estopped to deny it. 3. That a bank can certify that a cheque is good, such certificate being equivalent to an acceptance. 4. That the cashier has authority to certify a cheque by virtue of his office. 5. That the question whether S. had authority to buy the gold was a question for the jury, on the evidence and principles above given. Clifford & Davis, JJ. dissenting. U. S. S. C. Rep. 10, Wallace, 604.

*Luellen vs. Hare.*—The defendants signed a blank form for a bill of exchange as drawers, and delivered it to W. for his accommodation. Without their knowledge, W. filled it up as a promissory note payable to the plaintiff's order, and gave it to him.

Held: That the alteration discharged the defendants from liability. 32 Ind. 211.

*Kember vs. Southern Express Co.*—The defendant, a common carrier, received from the plaintiff a package of gold, with full knowledge of its contents, and gave a receipt with the printed condition, "if the value of the property is not stated by the shipper at the time of shipment, and specified in the receipt, the holder thereof will not demand of the company a sum exceeding fifty dollars" for loss or damage. The charges were to be paid by the consignee. The property was lost, and the defendant claimed that it was not liable for more than fifty dollars, because the value was not specified in the receipt.

Held: That this was no defence. 22 La. Ann. 158.

*Rainey vs. Lang.*—A testator bequeathed a large amount of money to a religious corporation whose charter provided that it should not "take and hold" property yielding an annual income of more than \$10,000. At the date of his death the annual income of the corporation far exceeded that amount. His heirs-at-law claimed that the bequest was void.

Held: That the corporation could take, and it was a question for the State whether it should be allowed to hold. 58 Barb. 453.

*Terry vs. McNeil.*—The report of prices-current, printed for public information in a newspaper is admissible in evidence to show the price of grain in the market at the date of publication. 58 Barb. 241.

*Goodrich v. Weston.*—A copy, sworn to be correctly made from a press copy, of a letter, is admissible as secondary evidence to prove its contents, without producing the press copy. 102 Mass. 362.

*Rees vs. Jackson.*—After fruitless search for an original telegram, the copy received by the person to whom it was sent is evidence with the record of the receipt of such a telegram at the office. 64 Pa. 486.

*Spooner vs. Holmes.*—Certain coupons of United States bonds were stolen from the plaintiff and delivered to the defendant by one who received them from the thief, and by him sold and turned into money,

which he paid to the person of whom he received them. It appeared that the defendant acted only as this person's agent, without personally deriving any benefit from his acts; that he received the coupons without knowing, and without gross negligence in not knowing that they had been stolen; and that the plaintiff had never demanded them or their proceeds of him.

Held: That he was not liable for their conversion. 102 Mass. 503.

*French vs. Vining.*—The defendant having a lot of hay on which he knew that white lead had been spilt, tried to separate the damaged hay from the rest, and thought that he had succeeded. From what was left he sold to the plaintiff a quantity, knowing that it was bought as food for a cow, which on eating it sickened and died, from the effects of lead that still remained on it.

Held: That the plaintiff could recover the value of the cow. 102 Mass. 132.



## TABLE DES MATIÈRES.

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ABSENCE. V. *Prescription*.

AB INTESTACY. V. *Gray*.

ACTE DE L'AMÉRIQUE BRITANNIQUE DU NORD, 1867. V. *Droit Constitutionnel*.

ALABAMA. — Réclamations de l'Alabama. Dommages-intérêts des Etats-Unis contre la Grande Bretagne, causés par les corsaires Sudistes ; reconnaissance du Sud comme puissance belligérante, 2-12.—Opinions scientifiques sur la guerre civile, 12-18.—Violation des devoirs d'un Etat neutre de la part de la Grande Bretagne par l'armement de l'Alabama, 18-21.—Exploits des corsaires Sudistes, 21-24.—Réclamations privées en dommages-intérêts, 24-27.—Prétentions des Etats-Unis à une réparation, 27-29.—Conclusion, 29-30.—Lettre de Mr. le professeur Lieber sur l'arbitrage international, comme moyen de résoudre la question de l'Alabama, 30-38. V. *Washington*.

ARBITRAGE INTERNATIONAL.—Lettre de Mr. le professeur Lieber sur l'Arbitrage international, 30-38, V. *Arbitrage Provincial*.

ARBITRAGE PROVINCIAL.—Arbitres Provinciaux, 68.—Droit commun anglais en matière d'arbitrage, 69.—La majorité des Arbitres Provinciaux pouvait-elle instruire et juger le litige en l'absence de l'un des arbitres, 70.—Droit Anglais sur ce point, 71.—Droit Américain, 72.—Droit Français, 73.—Procédure en matière d'arbitrage international, 74.—La majorité des Arbitres Provinciaux pouvait-elle décider ? Etats mi-souverains, 74-88.

ACTION HYPOTHÉQUAIRE. V. *Transport*.

ALIMENS. V. *Procédure, Femme*.

AMERICAN LAW REVIEW sur la question des Pêcheries, 233-240.

APPEL. V. *Procédure*.

ARGENT. V. *Voituriers*.

ASSIMILATION of the Laws of Ontario, New Brunswick and Nova Scotia, 249-262.

ASSIGNATION. V. *Procédure*.

ASSURANCE.—Comment et quand une police d'assurance doit être transportée ? 241, 243.—Introduction d'une machine à gaz dangereuse annule la police, 475.—Créancier chirographaire n'a pas dans le fonds commercial de son débiteur un intérêt qui puisse être assuré, 480.

AUTORISATION DE LA FEMME. V. *Procédure*.

AVIS D'ACTION. V. *Procédure*.

BANQUE. V. *Corporation, Billet.*

BILLET DE LOCATION. V. *Hypothèque.*

BILLET PROMISSOIRE.—Donné sous les menaces d'une poursuite criminelle est nul, 119.—Billet donné par deux cultivateurs n'entraîne pas solidarité entr'eux, 121.—Renouvellement promis doit être demandé avant l'échéance, 123.—Falsification par un commis, 124.—Défaut partiel de considération est une mauvaise défense, 241.—Dépôt d'un effet de commerce avec un but spécial, 242.—Prolongation du terme d'échéance et protêt, 473.—Altération de billet, 475, 486, 491.—Diligence à apporter dans l'acceptation d'une lettre de change 478.—Billet payable en trente sous, comment payable? 479.—Timbres sur billet, 481, 485.—Intérêt que les banques peuvent exiger, 485.—Certificat de dépôt payé au porteur sur endossement du dépositeur, 124, 485.—Lettre de change transmise avec un connaissement, 487.—Affaires de banque sur billets, chèques, speculation sur l'or, 490.—Pouvoirs du Caissier, 490.—Vol de coupons, 492.—Billet pour l'usage d'un tiers, 486.

BLOCUS. V. *Alabama.*

BLUNTSCHLI, J. C. Opinion Impartiale sur la question de l'Alabama, 1-30.

BOIS DE LA COURONNE. V. *Mandamus.*

BORNAGE.—Clôture de ligne de trente ans sert de bornage, 121.

BONNES MŒURS. V. *Testament.*

CAUTIONNEMENT.—Opposition à l'exécution d'un cautionnement, *recognition*, forfait en matières criminelles, 247.

CADASTRE. V. *Hypothèque.*

CAISSIER DE BANQUE. V. *Corporation.*

CANADA. V. *Arbitrage Provincial, Droit Constitutionnel, Pêcheries, Washington.*

CAPIAS AD RESPONDENDUM. V. *Procédure.*

CARTER, EDW. Q.C. Bibliography: The Magistrate Act of 1869, 99-107.

CATHOLIQUES ROMAINS. V. *Récusation, Droit Constitutionnel.*

CERTIORARI. V. *Procédure.*

CERTIFICAT DE DÉPÔT. V. *Billet.*

CHEMINS DE FER. V. *Corporation, Voituriers.*

CHEMINS DE FRONT. V. *Corporation.*

CHÈQUE. V. *Billet.*

CIMETIÈRES. V. *Sépulture, Procédure.*

CONNAISSEMENT. V. *Billet.*

CODES.—Comment seront amendés? 246,

CONTRAINTÉ PAR CORPS. V. *Procédure.*

CONFÉDÉRATION DU SUD. V. *Alabama.*

CORPORATION DE MONTRÉAL. V. *Corporation.*

CONSEIL SUPÉRIEUR DE QUÉBEC. V. *Droit Constitutionnel.*

CONSIDÉRATION. V. *Billet, Vente.*

**CORPORATION.**—Action sous la loi municipale, 119.—Corporation étrangère peut-elle acquérir des immeubles? 120.—Expropriation, 121.—Ses pouvoirs d'émettre des billets, 121.—Actions souscrites par surprise dans le fonds social d'une compagnie, 121.—Donation pour l'érection d'un Hôpital, 123, 491.—Transport des actions dans le fonds social, 124.—Legs ou fidéicommiss dans le but d'établir une institution littéraire, 243.—Contrats qui rendent inéligible aux charges municipales à Montréal, 245.—Doit poursuivre en son nom corporatif, 246.—Chemin de front, sa largeur, 473.—Propriétaires redevables des taxes municipales, nonobstant donation d'usufruit, 473.—Quand la Corporation est responsable du dommage causé par des obstructions dans les rues, 475.—Quand elle peut exiger le paiement des parts souscrites, 475.—Corporation peut commettre un libelle, 475.—Paiement des taxes par billet, 476.—Corporations responsables comme les individus même pour l'assaut et batterie de ses officiers *en devoir*, 476.—Municipalités responsables des ponts qui sont simplement considérés publics, 476.—Intérêt exigible par les Banques sur billets, 485.

**COMMISSION.** V. *Washington*.

**COMMISSAIRES D'ÉCOLES.** V. *Procédure*.

**COMPARUTION.** V. *Procédure*.

**COMPENSATION.** V. *Société*.

**COMPOSITION.** V. *Faillite*.

**COMPROMIS.** V. *Vente*.

**COUPONS.** V. *Prescription*.

**CONDITION.** V. *Vente*.

**COUR D'APPEL.** Jurisprudence comparée de la Cour d', 231-237, 377-380.

**COURONNE ANGLAISE.** V. *Mandamus, Pêcheries, Procédure, Washington*.

**CUIRS.** V. *Vente*.

**CURATÈLE.** V. *Procédure*.

**DÉCISIONS RÉCENTES.** Sommaire des, 119, 241, 473.

**DÉCLINATOIRE.** V. *Procédure*.

**DÉCLARATION.** V. *Procédure*.

**DÉLÉGATION.**—Défaut d'acceptation de délégation avant l'action, 476.

**DÉCRÊT.** V. *Procédure, Hypothèque*.

**DIMES,** 245.

**DOMMAGES-INTÉRÊTS.** V. *Langelier, Procédure, Juges de Paix, Séduction*.

**DOUAIRE.** V. *Faillite*.

**DROIT CONSTITUTIONNEL.**—Pouvoirs du Parlement du Canada sur la procédure devant les juges de paix en matières civiles, 106.—Pouvoirs des Législatures en matières de faillite, 117, 212, 474.—Sources du Droit Constitutionnel du Canada, 190-203.—*Quid* des traités de l'Empire et des lois divines? *ibid.*—Quelles sont les autorités compétentes pour décider les questions constitutionnelles? 263-269. Dans quels cas une loi peut-elle être déclarée inconstitutionnelle? 269-272.—De la constitutionnalité de quelques lois particulières, 272-273.—L'Eglise et l'Etat en Canada, 431.—

- En France, avant la révolution de 93, l'Eglise relevait de l'Etat et était justiciable des tribunaux civils même en matières spirituelles, 431.—Ce droit aussi bien que l'officialité ont-ils été introduits en Canada? 437.—Juridiction du Conseil Supérieur de Québec, 445.—Opinions juridiques sur la question, 446.—Situation des Eglises Protestantes avant la cession, 455.—Quelle sépulture les tribunaux peuvent ordonner? 477.—Rapports des convictions des juges de paix, 487.
- DRIT CRIMINEL.—Admission à caution, 470.—Père qui abandonne son enfant, 489.—Vol, *ibid.*—Déposition, *ibid.* V. *Cautionnement*.
- DRIT ECCLÉSIASTIQUE. V. *Droit Constitutionnel*.
- DRIT INTERNATIONAL. V. *Alabama, Arbitrage Provincial, Pêcheries, St. Laurent, Droit Constitutionnel, Traité de Washington*.
- DRIT ROMAIN. *Etude du*,—273-293.
- EFFETS DE COMMERCE. V. *Billet*.
- EGLISES. V. *Droit Constitutionnel*.
- ELECTIONS. Lois des élections parlementaires, 456.
- ENFANT. V. *Droit Criminel*.
- ENQUÊTES. Système des,—228-230.
- ENCHÉRISSEURS. V. *Procédure*.
- ESCLAVAGE. V. *Alabama*.
- ETRANGÈRE.—Corporation. V. *Corporation*.
- ETATS CONFÉDÉRÉS. V. *Alabama*.
- ETATS MI-SOUVERAINS. V. *Arbitrage Provincial*.
- ETATS-UNIS. V. *Alabama, Pêcheries, St. Laurent, Washington*.
- EXCEPTIONS. V. *Procédure*.
- FAILLITE. Action sur vente des dettes du failli, 120.—Composition, 171-188, 405-417, 243.—Douaire et gains de survie, 243, 474.—On procède toujours par requête sommaire contre le syndic, et par action, 248.—Transport signifié lors de la déclaration de la faillite, 248.—Gardien en faillite peut prendre une saisie revendication, 474.—Vente des dettes actives d'une faillite, 474.—Effets d'une cession sous le droit commun, 481.—Quand une faillite est ouverte, 482.—Préférence, *ibid.*—Hypothèque dans les 30 jours, 484, 487.—Second faillite, 485.
- FAUX. V. *Billet*.
- FÉLONIE. V. *Vente*.
- FRAIS. V. *Procédure*.
- FEMME. Doit demeurer avec son mari; elle ne peut le laisser sous prétexte que sa demeure n'est pas confortable, 473. Quand peut-elle obliger son mari pour dépenses du ménage et de toilette? 484.
- FOLIE ET FUREUR. V. *Procédure*.
- FRAUDE. V. *Procédure, Faillite*.
- GAINS DE SURVIE. V. *Faillite*.
- GIROCARD, D. L'Arbitrage Provincial, 68-88.—Conflict of Commercial Prescriptions, 125-151.—The Joint High Commission, 219-228.—Le Droit Constitutionnel du Canada 189-203, 263-273.—The Treaty of Washington, 302-359.—Church and State, 431-456.

- GRAY, Hon. J. H. Assimilation of the laws of Ontario, etc., 249-262.  
The Riel-Scott affair, 293-302.—Laws of Wills and Intestacy in Ontario, etc., 417-430.—Election Laws, 456-465.
- GUIBORD, Affaire. V. *Droit Constitutionnel, Récusation.*
- HYPOTHÈQUES.—Sur Vaisseaux, droits qui en résultent, 241. Renouvellement des, *ibid.*—Hypothèque des frais en appel, 242.—Décret ne purge pas les hypothèques maritimes, 242.—Crainte de trouble pour cause d'hypothèque prescrite, 243, 246, 473.—Du renouvellement des hypothèques, 368-376.—Renonciation de la femme à son hypothèque pour sureté de ses droits matrimoniaux est valide, même après séparation de biens, 478.—Billet de location de la part du Gouvernement avec possession, 479.
- HÔPITAL. V. *Corporation.*
- IMPUTATIONS DE PAIEMENT. Exemples, etc., 484.
- INCENDIE. Dommages causés par un feu de terre neuve au terrain du voisin, 120.
- INJURE VERBALE ET LIBELLE.—Répétition de rumeurs publiques, 123.  
Aucun dommage n'est dû, si le *capias*, rejeté pour informalité, a été émané pour de justes causes, 480. V. *Procédure.*
- INSPECTEURS. V. *Cuir.*
- INTÉRÊT. V. *Imputations.*
- JUGES DE PAIX. Personnellement responsables de l'arrestation de l'accusé, si l'accusation n'a pas été écrite en leur présence, 474.—Leurs Rapports, 487.
- JURISPRUDENCE COMPARÉE de la Cour d'Appel, 231-237, 377-380.
- JURY. V. *Procédure.*
- KERR, Wm. H. The Fishery Question, 38-68, 238-240.—Revue critique de son ouvrage.—The Magistrate Act of 1869, 99-107.—Deeds of Composition and Discharge, 171-188, 405-416.—Navigation of the St. Lawrence, 204-218.—Legal Ethics, 466-470.—The Queen vs. Coote, 470.
- LANGELIER, F. De l'inexécution des obligations, 391.
- LETTRE DE CHANGE. V. *Billet.*
- LETTRE DE GARANTIE. Exemple 242.
- LÉGISLATURES PROVINCIALES. V. *Droit Constitutionnel, Commission.*
- LEX LOCI, LEX FORI. Etat civil des enfans, 489.—V. *Prescription.*
- LETTRES PATENTES. V. *Hypothèque.*
- LIBELLE. V. *Injure, Corporation.*
- LOUAGE. Mauvais état des lieux loués, 122.—Défense de sous-louer, 475.—Effet de la clause que le locataire paiera toutes les taxes extraordinaires et ordinaires, 476.—Louage de meubles avec promesse de vente, 476.—Saisie-revendication a-t-elle alors lieu, *ibid.*—Privilege du locateur, 481.
- LOUISIANE. Ses lois, 152-170, 273-293.
- MAIN MORTE. V. *Corporation,*

- MANDAMUS. N'a pas lieu contre l'agent des Bois de la Couronne, 248.  
Doit-il être dans la forme anglaise ? 477.—Comment adressé dans le cas de demande de sépulture ? *ibid.*—Peut-il comprendre plus d'un objet ? *ibid.*
- MERRICK, HON. E. T. The Laws of Louisiana and their sources, 152-170.
- MONTRÉAL. V. *Corporation.*
- MORALE. V. *Testament.*
- MOSES, H. H. Writ of Prohibition, 360-367.
- MODES et marchandises fournies à la femme, *Quid ?* 484.
- MUNICIPALITÉS. V. *Corporation.*
- NÉCESSAIRES. Choses nécessaires à la vie avancées à la femme, 484.
- NEUTRALITÉ. V. *Alabama, Traité de Washington.*
- NORMANDEAU, P. E. Re-registration of real rights, 368-376.
- NEW BRUNSWICK. V. *Gray.*
- OBLIGATION. Maladie peut être une excuse de l'inexécution de l'—488.  
V. *Langelier.*
- OFFICIALITÉ. V. *Droit Constitutionnel.*
- OFFRES RÉELLES. V. *Billet.*
- ONTARIO. V. *Gray.*
- OPPOSITION. V. *Cautionnement.*
- PAIEMENT. V. *Prescription, Offres, Imputations.*
- PARLEMENT DU CANADA. Privilège du, 487.—V. *Droit Constitutionnel.*
- PATENTE. V. *Procédure.*
- PÊCHERIES. La question des Pêcheries de l'Amérique Britannique du Nord. Historique de la question, 38-40.—Souveraineté des nations sur la mer et les côtes de la mer, 40-42.—Traité de 1783 fut-il rappelé par la guerre de 1812 et les traités qui l'ont suivie ? 42-44.—Convention de 1818, et son interprétation quant à la difficulté des promontoires et des baies, 44-49.—Détroit de Canso; passage naturel entre deux masses d'eaux, 49-50.—Message du Président des E. U., du 5 décembre 1870, 50-63.—Jurisdiction du Canada sur les Pêcheries; elles ne peuvent être cédées sans le concours des Chambres 219-228.—*L'American Law Review* sur la question des Pêcheries 238-240.—Règlement de la question proposé par le Traité de Washington, 323.—V. *Washington.*
- PERKINS (J. A.)—My First Jury Trial, 89-98.
- PENSION ALIMENTAIRE. V. *Procédure.*
- PIANISTE. V. *Obligation.*
- POSSESSION. V. *Hypothèque.*
- PONT. V. *Corporation.*
- PRESCRIPTION. Coupons, comment prescrits ? 124—Quelle loi régit la prescription ? 125-151.—Absence interrompt-elle les courtes prescriptions ? 128-132.—Paiement, cause d'interruption de, 479.
- PRESTATION DES FAUTES. V. *Langelier.*
- PREUVE. V. *Procédure.*
- PRIVILÈGE. V. *Hypothèque, Louage.*

PROCÈS PAR JURY. 89-98. V. *Procédure*.

PROVINCE DE QUÉBEC.—Sources de ses lois, i-iv, 189. V. *Droit Constitutionnel*, *L'Arbitrage Provincial*.

PROHIBITION. Writ of, 360-367.

PROTESTANTS. V. *Droit Constitutionnel*.

PROCÉDURE. Informalités dans la procédure devant les juges de paix 103-104.—Amendements devant les juges de paix 105-106.—Récusation des juges Catholiques, 107-117.—Action municipale 119. *Venditioni exponas*, 120.—*Capias ad respondendum* 120, 246, 480, 481.—Décrêt 120.—Poursuites contre les associés après sa dissolution, *ibid*.—Action pour gages d'un mineur par son père non tuteur, 121, 245.—Appel de la Cour de Circuit, 122.—Femme curateur à son mari peut poursuivre seule. *ibid*—Formalités antérieures à un appel n'affectent pas la juridiction du tribunal, *ibid*.—Durant l'appel d'un jugement renvoyant une action en séparation de corps, une pension alimentaire n'est pas due à la femme, *ibid*.—Transcript doit être de tout le dossier, 241.—Assistance du mari est suffisante autorisation dans une action, *ibid*.—Jugement en appel de consentement, *ibid*.—Motion nonobstant le verdict, *ibid*.—Droit d'appel de la Couronne, *ibid*.—Refus de production de pièces, 242.—Exceptions préliminaires et au fonds produites à la fois sans demande, 242, 476.—Action sans conclusion, 242.—Contrainte par corps ne sera accordée qu'après commandement de payer, 246.—Sequestre, quand accordée, *ibid*.—Moyens d'exception à la forme dans une requête pour casser un *capias*, *ibid*.—Défenses unies de la part de défendeurs ayant comparu séparément, 247.—Cautionnement pour frais, quand demandé? *ibid*.—L'action en dommages pour faux emprisonnement n'a lieu tant que la conviction n'a pas été annulée, *ibid*.—Particularités de l'action, comment fournies? *ibid*.—Choix du jury, *ibid*.—Défaut de production du certificat de la transmission du dossier au Conseil Privé, 248.—Exemples de condamnations aux frais, *ibid*.—Répliques spéciales, 473.—Information doit être prise en présence du magistrat, 474.—L'appel par *certiorari* a toujours lieu, lorsque la conviction ne fait mention d'aucune raison, 475.—Prothonotaire responsable des deniers déposés même par corps sur règle, 477.—Délais d'assignation, 479.—Folie ou fureur n'est pas une cause de séparation de corps, *ibid*.—Avis doit être donné aux commissaires d'Ecoles avant de prendre une action contre eux, 480.—Avant de renouveler une action, les frais dus à la défense doivent être payés. Compensation ne peut alors avoir lieu, 480.—Si la défense ne fait pas preuve dans un procès par jury, la demande n'a pas droit de réplique, 480.—Erreurs dans un certificat régistrateur constatées après jugement de distribution, 480.—Nombre d'enchérisseurs requis aux ventes de meubles, 481.—Fraude peut-être plaidée sur une contestation de déclaration de tiers-saisi, 482.—Quels deniers peuvent être saisis-arrêtés en mainstierces? *ibid*.—Quand un procès par jury peut être demandé?

- ibid.*—*Sciri facias* en nullité de *patentes* ou brevets d'invention doit émaner sur le *fiat* du Procureur-Général, 487. *Rapports des marchés* font preuve, 491. Preuve secondaire, 491. Copie de télégramme, 491.
- PROMESSE DE MARIAGE. Devant être exécutée après le décès du père du défendeur, 123.
- PROTÊT. V. *Billet*.
- PROTHONOTAIRE. V. *Procédure*.
- RACICOT, ERNEST. A nos Législateurs, 228-230.
- RECOGNIZANCE. V. *Cautionnement*.
- RÉGISTRATEURS. V. *Procédure*.
- REDFIELD, ISAAC F. History and success of Law Reform through the agency of legislation in the United States, 381.
- RENOUVELLEMENT. V. *Billet*, *Hypothèque*.
- RÉPLIQUE. V. *Procédure*.
- RÉVOLUTION. Principes du droit international sur la révolution civile. V. *Alabama*.
- REVENDEICATION. V. *Procédure*, *Vente*, *Louage*.
- RIEL-SCOTT AFFAIR, 293-302.
- RIVIÈRES NAVIGABLES. Obstructions dans les, 482.
- ROSELIUS, C. Introductory lecture to the study of the law, 273-293.
- SAN JUAN. V. *Washington*.
- SIGNIFICATION. V. *Transport*, *Délégation*.
- SÉDUCTION. Femme séduite par un homme qu'elle sait être marié n'a pas d'action, 475.—Pareillement une femme qui a servi de maîtresse, 483.
- SÉPARATION DE CORPS. V. *Procédure*.
- ST. LAURENT. Navigation du.—Prétentions respectives des Etats-Unis et de la Grande Bretagne, 204-211. Description de cette navigation, 211. Opinions scientifiques sur la liberté des fleuves, 211-213. Conclusions, 213-218. Règlement de cette question par le Traité de Washington, 339.—V. *Washington*.
- SÉPULTURE. V. *Droit Constitutionnel*.
- SEQUESTRE. V. *Procédure*.
- SERVITUDE. Pas de servitude sans titre, 242.
- SÉPARATION DE CORPS. V. *Procédure*.
- SOCIÉTÉ. Composition d'une,—avec les créanciers des associés, 171-188, 405-416.—Convention de compensation faite par un associé, 245. V. *Faillite*, *Procédure*.
- SOLIDARITÉ. V. *Billet*.
- SUCCESSIONS, Lois des,—dans Ontario, etc., 417.
- TAXES. V. *Corporation*.
- TÉLÉGRAMME. V. *Procédure*.
- TESTAMENT. Signature déchirée et remise par le testateur vaut-elle ? 123. Lois concernant les Testaments dans Ontario, etc, 417.—Clause dans un testament privant un légataire de son legs en cas de contestation du testament, 480.—Legs dépendant de la bonne conduite du légataire, 484.



**TIMBRES.** V. *Billet*.

**TRADITION.** V. *Vente*.

**TRAITÉS de l'Empire** ont ils force de lois 193-203.

**TRAITÉ DE WASHINGTON.** V. *Washington*.

**TRANSCRIPT.** V. *Procédure*.

**TRANSPORT.** Acte de signification de,—doit être laissé au débiteur  
245.—Signification faite lors de la déclaration de la faillite, 248.  
—Défaut de signification du,—avant l'action, 476.—Action hypothécaire sur transport n'a lieu qu'après signification du transport, 480.

**TROUBLE.** Craintes de. V. *Hypothèque*.

**VAISSEAUX.** V. *Hypothèque*.

**VENTE,** de meubles doit être accompagnée du déplacement, 120.—  
Vente d'immeuble faite en compromis d'une féloine, 121.—Bail avec promesse de vente ou vente conditionnelle de meubles. Bailleur ne peut alors revendiquer, 476.—Vente par mesure ou tenants et aboutissants, 120, 483.—Vente de marchandises à la femme sans l'autorisation du mari, 484.

**VERDICT.** V. *Procédure*.

**VOITURIERS.** Sont responsables des sacs qui ont servi au transport des grains, 124. Livraison d'effets au gardien de la gare du chemin de fer, 246.—A quelles obligations est tenu le maître du navire, 246.—Effets des avis limitant la responsabilité des compagnies de chemins de fer, 475, 477, 489, 491.—Cas de négligence, 489.—Transport des valeurs, argents, 491.

**WASHINGTON.** *La Haute Commission Conjointe*.—Ses pouvoirs.—La Couronne Anglaise eu temps de paix peut-elle céder les pêcheries ou aucune partie du domai ne Britannique sans le concours des Chambres, 219-228. *Traité de Washington*, 302-359. Historique de la question de l'Alabama, 302-308.—Négociations de la Commission Conjointe, 308-314.—Observations sur le règlement des réclamations de l'Alabama tel que stipulé au Traité, 314-318. Réclamations Feniennes, 318-322.—La question des pêcheries telle que réglée par le Traité, 323-339.—La question de la Navigation du St. Laurent, 439-347.—La question de l'Île de San Juan, 347-353.—Conclusions et observations critiques, 353-359.

**WOTHERSPOON.**—Chronique du Palais, 107-119.

LISTE DES CAUSES DONT LE SOMMAIRE EST  
PUBLIÉ DANS CE VOLUME.

	PAGE
Adam <i>v.</i> McCready .....	243, 473
Allan <i>v.</i> Clarkson .....	484
Arcand <i>v.</i> Blanchet .....	122
Arsenault <i>v.</i> Rousseau & al. ....	247
Attorney-General Ouimet <i>v.</i> Hon. J. H. Gray & al. ....	242, 476
Basin <i>v.</i> The School Commissioners of St. Anselme .....	480
Batten <i>v.</i> Stone .....	247
Bélanger <i>v.</i> Blais .....	479
Bélisle <i>v.</i> l'Union St. Jacques .....	118
Belknap <i>v.</i> Bank of North America .....	124
Bell <i>v.</i> Fothergill .....	123
Benning & al. <i>v.</i> Cook .....	241
Blais <i>v.</i> Barbeau .....	246
Boucher <i>v.</i> Brault .....	122
Bourassa <i>v.</i> McDonald .....	241
Brown <i>v.</i> La Fabrique de Montreal .....	107, 431, 477
Brown <i>v.</i> Corporation of Montreal .....	475
Burton <i>v.</i> Young & al. ....	248
Burnett <i>v.</i> Monaghan et Lanctot .....	473
Brown & Lemieux .....	476
Buchanan <i>v.</i> Smith .....	485
Campell <i>v.</i> The Grand Trunk Railway .....	475
Caron <i>v.</i> Sylvain .....	245
Chaudière Gold Mining Co. et Desbarats .....	120
Childerhouse <i>v.</i> Bryson .....	242
City <i>v.</i> Lamson .....	124
City of Glasgow Bank <i>v.</i> Arbuckle & Kerry .....	120
Clark <i>v.</i> Brean et Cornell & al. opp. ....	242
Coates <i>v.</i> The Glen Brick Co. & Welsh .....	121
Conlon <i>v.</i> Clark .....	473
Corporation de Montreal et Wilson .....	121
Corporation of Montreal <i>v.</i> Donegani .....	121, 473
Corporation de St. Martin <i>v.</i> la Cie de Chemins de Péage .....	119
Corse <i>v.</i> British American Insurance Co. ....	243
Cross <i>v.</i> Judah .....	242
Corporation of Montreal <i>v.</i> Doolan .....	476
Corporation of Eton & Rogers .....	476
Carson <i>v.</i> Bishop .....	121
Clemens <i>qui tam v.</i> Berner .....	487
Davies <i>v.</i> Smead .....	123
Davis <i>v.</i> Shaw et Shaw opp. ....	120
Doutre et Elvidge .....	120
De la Gorgendière <i>v.</i> Thibodeau .....	478
Dumaine <i>v.</i> The Corporation of Montreal .....	475
Dunn <i>v.</i> Campbell & Campbell .....	484
Evanturel <i>v.</i> Evanturel .....	480
Farrel <i>v.</i> Cassin .....	246
Fordyce <i>v.</i> Kearns .....	120
Forgie & al. <i>v.</i> The Royal Insurance Co. ....	241
Fraser & al. <i>v.</i> Abbott & al. ....	243
Fraser <i>v.</i> Patterson .....	248
French <i>v.</i> Vining .....	492
Frost <i>v.</i> Knight .....	123
Frost & al. and Cameron, and Gray & al., T. S. ....	482

	PAGE
Fraise v. Harwicker .....	483
Gibson v. Heney .....	484
Gates & al. v. Another .....	481
Gauthier & Sauvageau .....	248
Glen Brick Co. v. Shackwell .....	121
Goodrich v. Weston .....	491
Gouin et Dubord .....	248
Gugy, B.C.A. v. Wm. Brown .....	246
Grand Trunk Railway & Gutman .....	477
Gerrard & Hays & al. ....	482
Hall v. Devany .....	479
Hamilton v. Kelly .....	242
Harris v. Schwob .....	478
Hawkins v. Allen .....	123
Huard v. Dunn .....	247
Hutchins et al., <i>in re</i> , r.éq. pour décharge et Jeffery & al. cont. 182,	243
Hunt v. Home Ins. Co. ....	480
Joseph v. Turcotte .....	479
Kember v. Southern Express Co. ....	491
Kingley v. Dunlop .....	473
Kirby v. Hall .....	485
Lacombe v. Ste. Marie & al. ....	474
Lafond v. Rankin .....	474
Lavehure v. Dussault .....	248
Leduc v. Ouellet .....	122
Le Blanc et Beaudoin et Bédard .....	121
Lemay et Lemay .....	246
Lemieux et Forcade .....	122
Lemoine et Lionais .....	241
Le Procureur-Général pro Regina v. La Corporation de Comté de Compton .....	242
Long v. Brooks .....	242
Lavoie v. Lavcie .....	475
Lainé v. Clarke .....	475
Lalonde, ex parte for certiorari .....	475
Lemesurier v. Ritchie .....	481
Luellen v. Hare .....	491
Macfarlane et Dewey .....	119
Maillard v. Page .....	123
Malhiot v. Messier et Lemonde .....	121
Martineau v. Béliveau .....	473
McAndrews et Rowan .....	241
McCormick et Buchanan .....	241
McLaughlin v. Regina .....	247
McLennan v. Martin .....	245
Milot v. Chagnon .....	480
Morison, insolvent, <i>in re</i> , and Dame Ann Simpson and Henry Thomas .....	243, 474
Matthews v. Northern Assurance Co. ....	475
Massawippi Valley RR. Co. v. Walker .....	475
Maguire v. Corporation of Montreal .....	475
McKenzie and Quebec Bank .....	482
Montgomery and Price .....	482
Merchants' Bank v. State Bank .....	490
Maunder v. Royal Canadian Bank .....	485
Munro v. Cox .....	486
Macklem & al v. Thorne & al .....	486
McInnes v. Milton .....	486

	PAGE
National Bank, The, v. The City Bank .....	247
Olivier v. Bélanger .....	481
Orrell v. Orrell .....	489
Patterson v. Osborne .....	483
Parker v. Richard .....	484
Papineau & Guy .....	477
Park Gate Iron Co. v. Coates .....	122
Pattenaude v. Charron .....	121
Phillipsthal v. Duval .....	247, 480
Pierce v. Milwaukee and St. Paul R. R. Co. ....	124
Pollard et Irving .....	120
Poston & al. v. Watters .....	245
Poulin v. Wurtèle .....	479
Pacaud v. Provencher .....	480
Paquet v. McNab .....	481
Proulx v. Dorion .....	476
Pew v. Lefferty .....	484
Queen v. Patterson .....	487
Robinson v. Davidson .....	488
Rainey v. Lang .....	491
Royal Canadian Bank vs. Shaw & al. ....	485
Royal Canadian vs. Kerr .....	486
Rees v. Jackson' .....	491
Reg. v. White .....	489
" v. Townley .....	489
" v. Fletcher .....	489
R. v. Hamelin .....	246
Ranger et Seymour .....	120
Rev. Messire Pierre Roy v. Jos. Bergeron .....	245
Ricard v. St. Denis .....	481
Shackwell v. Glen Brick Co .....	121
Shaw v. Spencer .....	124
Smith v. McShane .....	245
Spelman et Robidoux .....	241
St. Bridget's Asylum v. Fernay .....	246
Ste. Marie v. Ostell .....	120
Shaw v. Laframboise .....	476
Sheppard v. Dawson and Dawson opp .....	480
Stein v. Seath .....	482
Shepherd v. Harrison .....	487
Speaker Legislative Assembly & Glass .....	488
Skottowe v. Young .....	489
Spooner v. Holmes .....	491
Symard v. Lynch .....	484
Thomas v. Rhymney R. Co. ....	489
Terry v. McNeil .....	491
Tardif v. Gingras & Jobin, contest .....	480
Tessier v. The Grand Trunk .....	246
The Principal Secretary of State v. McGreevy ..	248
Torrance v. The Bank of British North America ..	241
Villeneuve et Bédard .....	122, 479
Vallée v. Kennedy .....	475
Welsh v. Glen Brick Co .....	121
Wicksteed et Corporation of North Ham .....	473
Winn v. Pellissier .....	246
Whyte v. Bisson & al .....	474
Wilson v. Demers .....	125
Wilson v. Spencer, & Smith oppt .....	481

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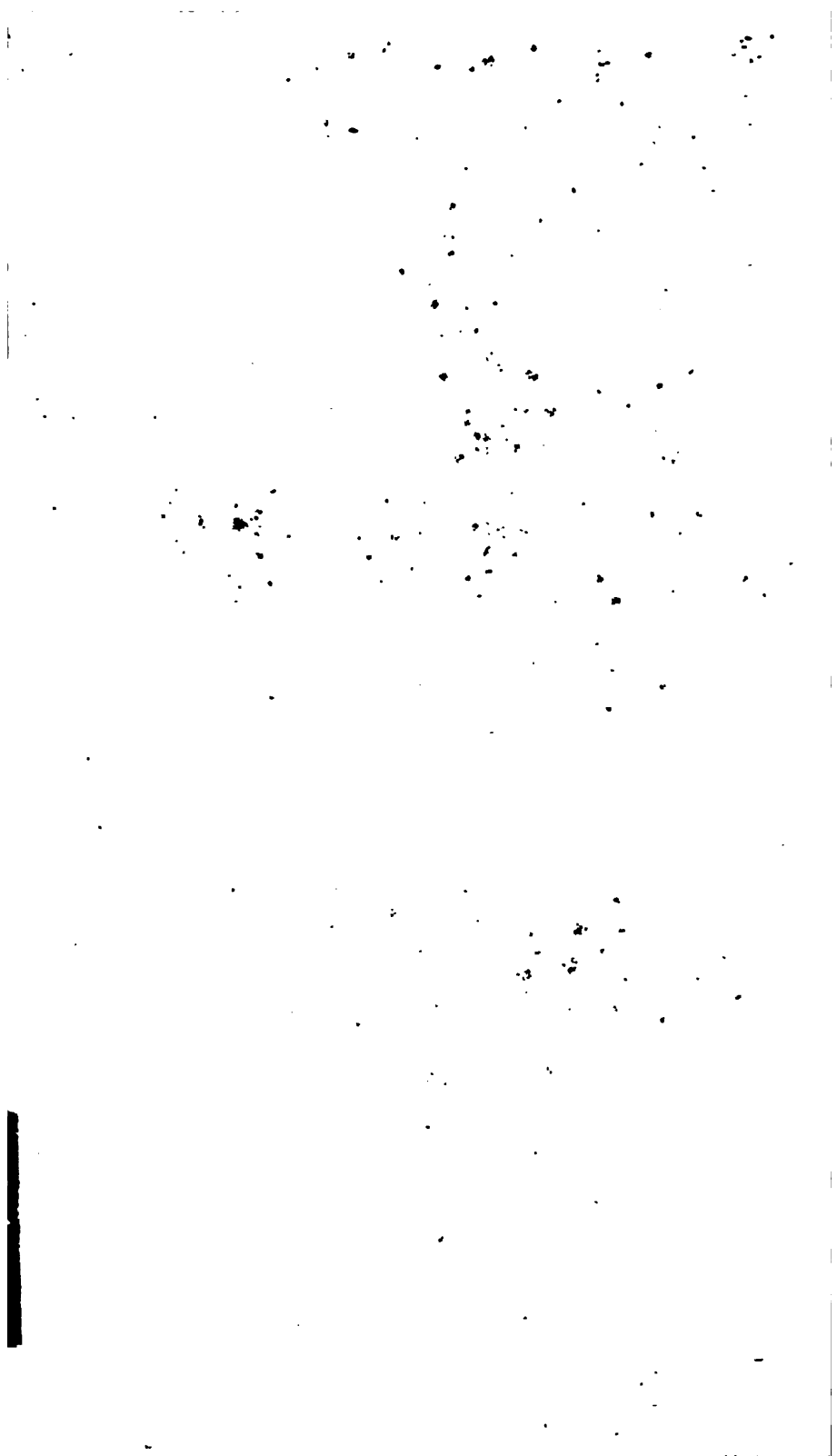
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